

Because this area of law has become a complex and widely contested issue, we prepared background information for you on the history of Amendment 7 and how Florida courts have interpreted its language and intent.

What is Amendment 7?

The Amendment's Wording:

Art. X, Fla. Const., is amended by inserting the following new section at the end thereof, to read: Section 22. Patients' Right to Know About Adverse Medical Incidents.

(a) In addition to any other similar rights provided herein or by general law, patients have a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident.

(b) In providing such access, the identity of patients involved in the incidents shall not be disclosed, and any privacy restrictions imposed by federal law shall be maintained.

(c) For purposes of this section, the following terms have the following meanings:

(1) The phrases 'health care facility' and 'health care provider' have the meaning given in general law related to a patient's rights and responsibilities.

(2) The term 'patient' means an individual who has sought, is seeking, is undergoing, or has undergone care or treatment in a health care facility or by a health care provider.

(3) The phrase 'adverse medical incident' means medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees.

(4) The phrase 'have access to any records' means, in addition to any other procedure for producing such records provided by general law, making the records available for inspection and copying upon formal or informal request by the patient or a representative of the patient, provided that current records which have been made publicly available by publication or on the Internet may be 'provided' by reference to the location at which the records are publicly available.

Florida Bar Journal Analysis

In its March 2009 issue, the Florida Bar Journal published an in-depth look at continuing court battles waged by healthcare providers trying to keep adverse incidents secret from patients – who have a constitutional right to these public records.

Eloquent in its simplicity, the purpose of Amendment 7 is “to create a constitutional right for a patient or potential patient to know and have access to records of a health care facility’s or provider’s adverse medical incidents, including medical malpractice and other acts which have caused or have the potential to cause injury or death.”

As sign of Amendment 7’s popularity, 5,849,125 citizens voted for it, while only 1,358,183 voted against it.

The article, quoted in the excerpts below, provides an excellent analysis of Amendment 7 and its importance to our state’s freedom of information and to patients’ rights. It compares the actions of Florida’s hospital organizations to the questionable tactics used by the tobacco industry in recent years in trying to keep its own dirty secrets from the public.

From the Florida Bar Journal – March 2009

[Riding the Red Rocket: Amendment 7 and the End to Discovery Immunity of Adverse Medical Incidents in the State of Florida](#)

On November 2, 2004, voters in Florida overwhelmingly approved Amendment 7. Known as the “Patients’ Right-to-Know About Adverse Medical Incidents,” Amendment 7 represents one of the most sweeping changes in law and public policy ever adopted in this state. In one fell swoop the amendment has successfully breached the walls of privilege and immunity surrounding secret peer review, credentialing, investigations, quality assurance, and risk assessments of both health care providers’ and health care facilities’ adverse medical incidents by paving the way for discovery of testimonial and documentary evidence relating to these activities. Adoption of the amendment has even lifted the spirits of medical malpractice lawyers in Florida, and the injured patients they represent, by enshrining in the Florida Constitution a virtual patient’s Bill of Rights, while “lift[ing] the shroud of privilege and confidentiality” that has swaddled the health care industry for years. [...]

Prior to its approval, public policy in Florida, codified across an array of statutes, restricted a patient’s right to know about a health care provider’s or facility’s adverse medical incidents and crowned the medical profession with an almost unlimited degree of authority, not only to regulate itself, but to conduct clandestine deliberations involving peer review, credentialing, investigations, quality assurance, and risk assessments, as well. This policy was based on a conventional belief that the medical profession could not deliver first-class health care without a high level of self-oversight, coupled with near bulletproof immunity from discovery of behind-the-scenes activities related to these pursuits.

Viewed from a historical perspective, Amendment 7 arose from a decades-long battle between doctors, insurance companies, and tort reformers on the one hand, and trial lawyers, patients’ rights advocates, and civil justice proponents on the other, over tort reform legislation and efforts by the medical-insurance complex to curtail, if not eliminate, medical malpractice claims entirely. [...]

What Have the Courts Said?

Almost immediately after its passage, Florida health care providers challenged the new law in court when presented with requests for access to adverse incident reports.

Despite the simplicity of Amendment 7’s language, the medical community argued it was too overly vague and burdensome in its requirements on providers. To muddy the waters further, they asked courts to determine:

- 1) Whether the amendment was self-executing, or required enabling legislation.
- 2) Whether it preempted well established statutory immunities, or was it merely supplementary.
- 3) Whether it applied retroactively or prospectively.

As these cases climbed the judicial ladder from trial court through the appellate system, lawyers on both sides anticipated the matter would eventually be taken up by the Florida Supreme Court. It took less than four years.

From the Florida Bar Journal – March 2009

In March 2008, the Florida Supreme Court handed down its groundbreaking decision in *Florida Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478 (Fla. 2008). In a per curiam opinion resulting in a 4-3 split, the majority addressed in reverse order the certified questions raised by the *Buster* court below. In doing so, the majority first found the amendment to be self-executing. [...]

Thereafter, the majority undertook to resolve the central issue of retroactivity by employing the same two-pronged test enunciated in *Chase Federal*. As to the first prong, the majority [found]:

the amendment permits patients to access *any* record relating to *any adverse medical incident*, and defines “patient” to include individuals who *had previously undergone treatment* . . . [the majority held Amendment 7] expresses a clear intent that the records subject to disclosure include those created prior to the effective date of the amendment.

In other words, the effective date of the amendment merely established a date by which an individual’s right to obtain “any” existing records took effect, not simply the right to acquire those records generated after the effective date. [...]

Even after the Florida Supreme Court ruling, hospital organizations have continued to seek relief from complying with the law. According to the Florida Bar Journal, they've continued to lose.

In *Amisub North Ridge Hospital, Inc. v. Sonaglia*, 2008 WL 464145 (Fla. 4th DCA 2008), the courts pushed the limits of Amendment 7 to include production of a nonparty's peer review records for use by a consenting patient's physician in a defamation and tortious interference suit against the physician's prior partners.

In an effort to expand the reach of both attorney-client and work product protections, so as to restrict the operation of the amendment, risk managers have been instructing health care providers and facilities throughout the state how to immunize from discovery minutes, records, reports, and other information generated by peer review, credentialing, investigations, quality assurance, and risk assessment committees, by having present at such meetings an attorney or attorneys who may later claim the attorney-client privilege or work product protection in order to circumvent the amendment's operation.

Interestingly, this was the same tactic employed for years by the tobacco industry. [...]

Additional Appellate Rulings Regarding Amendment 7

- **District Court of Appeal of Florida, First District.** West Florida Regional Medical Center, Inc., d/b/a West Florida Hospital, Petitioner, v. Lynda S. See and Rodney C. See, Respondents. **Nos. 1D09-1055, 1D09-1144.** July 29, 2009.
- **District Court of Appeal of Florida, Fourth District.** Columbia Hospital Corporation of South Broward d/b/a Westside Regional Medical Center, a foreign for profit corporation, Petitioner, v. Rebecca Fain, as Personal Representative of the Estate of William Thomas Fain, deceased, Respondent. **No. 4D08-4578.** June 17, 2009.
- **District Court of Appeal of Florida, Fifth District.** FLORIDA EYE CLINIC, P.A., Petitioner,,v. Mary T. Gmach, Respondent. **No. 5D09-64.** May 29, 2009.
- **District Court of Appeal of Florida, Second District.** Lakeland Regional Medical Center, a Florida corporation, Petitioner, v. Alexis Leigh Neely, a minor, by and through her parents, Ronica and Bryan Neely; Ronica and Bryan Neely, individually; Gracia Maria Damian, M.D.; and Lakeland OB-GYN, P.A., Respondents. **No. 2D08-4102.** May 8, 2009.