

LAW WATCH

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AMENDMENT 7: THE PATIENTS' RIGHT TO KNOW FLEXES ITS MUSCLE IN FLORIDA

The Florida "Patients' Right to Know Amendment" or as it is often referred to "Amendment 7," continues to eviscerate the peer review privileges which prevented the disclosure of information revealed during the course of a peer review proceeding brought against a physician or other health care provider in Florida.

Two recent Florida District Court of Appeal rulings both upheld the constitutionality of Amendment 7, while at the same time declaring unconstitutional the Florida statute the legislature passed intending to clarify and implement Amendment 7.

While the two courts' decisions are similar, the judicial reasoning diverges in one respect. One decision held that Amendment 7 should be applied retroactively to peer review information existing prior to the date of the enactment of Amendment 7, while the other ruled that Amendment 7 should only be applicable on a prospective basis.

At this time, peer review information developed after the enactment of Amendment 7 remains susceptible to discovery through the course of litigation, but whether this will relate to peer review information ascertained prior to the enactment of Amendment 7 remains unclear. However, the Florida Supreme Court will likely clarify this and other issues surrounding Amendment 7.

A BRIEF HISTORY

A constitutional amendment in Florida may originate by several methods, including a citizen's initiative procedure. Amendment 7 appeared on

Executive Summary

Action: *Constitutionality of Patients' Right to Know Amendment is upheld by two courts.*

Impact: *Peer review records are susceptible to discovery in Florida.*

Effective Date: *Immediately.*

the Florida ballot in 2004 through this process. On its face, Amendment 7 intended to remove any statutory privileges afforded health care providers engaged in a peer review process. For decades, health care providers throughout the United States have relied on the peer review process, and the accompanying privileges, which prevented discovery during litigation of information revealed during the peer review process, as the foundation for candid review of the performance of the involved physician(s) and other health care provider(s). The information developed during the peer review process, when appropriate, also formed the basis for corrective action, which can take many forms including: requiring remedial training; the use of proctors; or in extreme cases revoking a physician's or other provider's practice privileges at a health care facility.

Health care providers have long asserted, and state legislators have usually agreed, that without the protection of the privileges from discovery, the peer

review process would be ineffective. The rationale often cited includes the belief that one's peers would likely be less than candid and the peer review members would be exposed to unwarranted civil liability, but for the privileges.

The voters in Florida disagreed with this sentiment and stripped away the peer review privileges in 2004 through the enactment of Amendment 7.

PRESENT ISSUES

Amendment 7 sparked a flurry of litigation in the courts across Florida, answers to which were recently provided by the Courts of Appeal in *Florida Hospital Waterman, Inc. v. Buster*, and *Notami Hospital of Florida, Inc. v. Bowen*.

In the *Florida Hospital* case, the court summarized the issues as:

... 1) does Amendment 7 preempt statutory privileges afforded health care providers' self-policing procedures to the extent that information obtained through those procedures is discoverable during the course of litigation; 2) is Amendment 7 self-executing; and 3) should Amendment 7 be applied prospectively or retroactively.

Although addressed more thoroughly in *Florida Hospital*, both courts concluded that Amendment 7 does, in fact, preempt all statutory privileges afforded health care providers, relying in part on the Florida Supreme Court's Advisory Opinion to

the Florida Attorney General as follows:

Current Florida law restricts information available to patients related to investigations of adverse medical incidents, such as medical malpractice. This amendment [Amendment 7] would give patients the right to review, upon request, records of health care facilities' or providers' adverse medical incidents, including those which could cause injury or death.

Coupled with the language in Amendment 7 itself, the court in *Florida Hospital* opined that the initiative was a clear statement to change Florida law and allow access to peer review information during the course of litigation between a patient and his or her health care provider, concluding that "...what the Legislature [gives] through its enactments and the courts [enforce] through their decisions, the people [through the constitutional amendment process] can take away..."

Shortly after the passage of Amendment 7, the Florida Legislature enacted legislation to implement the provisions of Amendment 7. Both decisions found this legislation unconstitutional. And both the *Florida Hospital* and *Notami Hospital* decisions concluded that Amendment 7 was self-executing and did not require any legislation in order for it to become the law, although the legislature does have the constitutional authority to supplement Amendment 7, but not the power to change or render invalid any of its provisions.

The *Florida Hospital* court concluded that Amendment 7 should not be applied retroactively, and looked primarily at the language of Amendment 7 itself in coming to its conclusion, reasoning, "A law is presumed to operate prospectively absent a clear legislative expression requiring that the statute be retroactively applied."

However, the *Notami Hospital* court concluded that Amendment 7 should be prospective in operation, but applied retroactively with respect to existing records, stating:

Here, the plain language of 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 use of the word "any" to define the scope of discoverable records relating to adverse medical incidents, and the broad definition of "patient" to include those who "previously" received treatment expresses a clear intent that the records subject to disclosure include those created prior to the effective date of the amendment. The effective date merely sets forth the date patients obtained the right to receive the records requested. Because the plain language of the amendment expresses a clear intent that it be applied to include records created prior to its effective date, doing so is not an unconstitutional retroactive application.

(Emphasis in original.)

If you would like a copy of these decisions, or more information about peer review in Florida, please contact **Richard Johns** in our Orlando office, **Gary Koch, M.D.** in our Tampa office, or the member of the firm who normally handles your legal matters.

This *Law Watch* was authored by Richard Johns of our Orlando office. *Law Watch* is a review of recent legal developments prepared by Foley & Lardner LLP. The information reported should not be construed as legal advice, nor utilized to resolve legal problems. Recent issues of *Law Watch* are also available on our web site at:

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Editor: Carl Weissburg.

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Boston, Massachusetts
Tel: 617.342.4000
Fax: 617.342.4001

Brussels, Belgium
Tel: 011.32.2.639.2710
Fax: 011.32.2.646.0311

Chicago, Illinois
Tel: 312.832.4500
Fax: 312.832.4700

Detroit, Michigan
Tel: 313.234.7100
Fax: 313.234.2800

Jacksonville, Florida
Tel: 904.359.2000
Fax: 904.359.8700

Los Angeles, California
Tel: 310.277.2223
Fax: 310.557.8475

Madison, Wisconsin
Tel: 608.257.5035
Fax: 608.258.4258

Milwaukee, Wisconsin
Tel: 414.271.2400
Fax: 414.297.4900

New York, New York
Tel: 212.682.7474
Fax: 212.687.2329

Orlando, Florida
Tel: 407.423.7656
Fax: 407.648.1743

Sacramento, California
Tel: 916.443.8005
Fax: 916.443.2240

San Diego, California
Tel: 619.234.6655
Fax: 619.234.3510

San Diego/Del Mar, California
Tel: 858.847.6700
Fax: 858.792.6773

San Francisco, California
Tel: 415.434.4484
Fax: 415.434.4507

Silicon Valley, California
Tel: 650.856.3700
Fax: 650.856.3710

Tallahassee, Florida
Tel: 850.222.6100
Fax: 850.561.3710

Tampa, Florida
Tel: 813.229.2300
Fax: 813.221.4210

Tokyo, Japan
Tel: 011.81 3 5114.8320
Fax: 011.81 3 5114.8321

Washington, D.C.
Tel: 202.672.5300
Fax: 202.672.5399