Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis

(This document is based on the provisions contained in the proposal as of the latest date listed below.)

Proposal #: CS/P 99

Relating to: MISCELLANEOUS, Patients' right to know about adverse medical incidents

Introducer(s): General Provisions Committee and Commissioner Cerio

Article/Section affected: Article X, Section 25

Date: January 28, 2018

	REFERENCE	ACTION
1.	GP	**Fav/CS**
2.	DR	**Pre-meeting**

I. SUMMARY:

Article X, Section 25 of the Florida Constitution, commonly known as "Amendment 7," allows patients to access any records of a health care facility or health provider relating to adverse medical incidents. An "adverse medical incident" means medical negligence, intentional misconduct, or any other act, neglect, or default that caused or could have caused injury to or death of a patient. The Florida Supreme Court has interpreted this provision broadly in favor of disclosure of such records. Specifically, the Court has held that federal law designating certain information about adverse medical incidents as confidential "patient safety work product" does not preempt a patient's right to access such information under Article X, Section 25. Further, the Court has found that reports commissioned by a health care facility or provider's attorney relating to an adverse medical incident are not protected from disclosure under the work-product doctrine or attorney-client privilege.

The proposal amends Article X, Section 25 to specify that a patients' right to know about adverse medical incidents does not abrogate attorney-client privilege or work-product doctrine available under law. The proposal also provides that a health care facility or health care provider that violates the requirements of Article X, Section 25 may be subject to administrative discipline as provided by law.

If passed by the Constitution Revision Commission, the proposal will be placed on the ballot at the November 6, 2018, General Election. Sixty percent voter approval is required for adoption. If approved by the voters, the proposal will take effect on January 8, 2019.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Article X, Section 25: Patient's Right to Know about Adverse Medical Incidents

Article X, Section 25 of the Florida Constitution, which is generally referred to by its ballot designation, "Amendment 7," was proposed by citizen initiative and adopted in 2004.[1] Amendment 7 provides patients[2] "a right to have access to any records[3] made or received in the course of business by a health care facility[4] or provider[5] relating to any adverse medical incident."[6] "Adverse medical incident" is defined broadly to include "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 . . . ."[7] Amendment 7 also provides patients, including those who become medical malpractice plaintiffs, access to any adverse medical incident record, including incidents involving other patients, sometimes called occurrence reports, created by health care providers.

The Florida Supreme Court has explained that the adoption of Amendment 7 by the voters in 2004, signaled a shift in Florida public policy with regard to health care:

> Amendment 7 heralds a change in the public policy of this state to lift the shroud of privilege and confidentiality in order to foster disclosure of information that will allow patients to better determine from whom they should seek health care, evaluate the quality and fitness of health care providers currently rendering service to them, and allow them access to information gathered through the self-policing processes during the discovery period of litigation filed by injured patients or the estates of deceased patients against their health care providers. We have come to this conclusion because we are obliged to interpret and apply Amendment 7 in accord with the intention of the people of this state who enacted it. . . .[8]

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[1] Amendment 7 passed in the 2004 general election. *See* Florida Department of State website for details http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=35169&seqnum=3 (last visited 01/04/18).
[2] "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 "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.
[4] Refers to any facility licensed under ch. 395, F.S.
[5] "Health care provider" means a physician licensed under chapter 458, chapter 459, or chapter 461
[6] Section 25(a) of Art. X, Fla. Const.
[7] Section 25(c)(3) of Art. X, Fla. Const.
[8] Edwards v. Thomas, 229 So.3d 277 (Fla. 2017)

Thus the Court has stated that the purpose of Amendment 7[9] "was to do away with the legislative restrictions on a Florida patient's access to a medical provider's 'history of acts, neglects, or defaults' because such history 'may be important to a patient.' "[10]

In 2005, the Legislature enacted s. 381.028, F.S., to implement the provisions of Article X, Section 25 of the Florida Constitution. Section 381.028, F.S., specifies the privacy standards health care facilities and providers must observe in producing records relating to adverse medical incidents, how such records may be used in administrative and civil proceedings, and the process for producing such records (fees, etc.). There are currently no administrative penalties provided by general law for a health care facility or provider's violation of the requirement to disclose records relating to adverse medical incidents under Article X, Section 25 of the Florida Constitution or s. 381.028, F.S.

Interpretation of Article X, Section 25

The scope and applicability of Amendment 7 has been the source of litigation since its adoption, and the Florida Supreme Court has historically broadly interpreted the amendment in favor of disclosure.

One of the first and most important Florida Supreme Court cases to interpret Amendment 7 was *Florida Hospital Waterman, Inc. v. Buster*.[11] In *Buster*, the Court addressed three questions:

1. Whether the amendment was self-executing, or required enabling legislation;
2. Whether the amendment preempted well established statutory immunities, or was it merely supplementary; and
3. Whether the amendment applied retroactively or prospectively.[12]

The plaintiff in *Buster* filed a medical malpractice claim against a hospital and sought documents relating to "any medical incidents of negligence, neglect, or default of any health care provider" that occurred prior to the effective date of Amendment 7.[13] The hospital objected and filed for a protective order, but the trial court ordered the hospital to produce all the records requested by the plaintiff. The hospital filed for a writ of certiorari to the Fifth District Court of Appeal (Fifth DCA).[14] On appeal, the Fifth DCA held that Amendment 7 1) preempted statutory privileges afforded to health care providers' self-policing procedures "to the extent that information obtained in accordance with those procedures is discoverable during the course of litigation;[15] 2) did not apply retroactively; and 3) was self-executing. The Fifth District Court of Appeal anticipated

[9] Florida Hospital Waterman, Inc. v. Buster, 984 So. 2d 478 (Fla. 2008).
[10] Id. at 488 (quoting Advisory Op. to the Att'y Gen. re Patients' Right to Know About Adverse Med. Incidents, 880 So. 2d 617, 618 (Fla. 2004)).
[11] Florida Hospital Waterman, Inc. v. Buster, 984 So. 2d 478 (Fla. 2008).
[12] Id.
[13] Id.
[14] *See* Florida Hospital Waterman, Inc. v. Buster, 932 So. 2d 344 (Fla. 5th DCA 2006). Buster at 349. Since the standard of review for an interlocutory petition for writ of certiorari is whether the trial court departed from the essential requirements of the law irreparably such that they cannot be remedied on appeal, the *Buster* court simply rules on both parties' briefs without oral argument.
[15] Id. at 349.

conflicts with other districts and certified these holdings in the form of questions to the Florida Supreme Court for review.[16]

On review of the *Buster* case, the Florida Supreme Court took a very expansive reading of the provisions of Amendment 7.[17] The court held that: 1) Amendment 7 was self-executing, and did not require a statute to implement its terms[18]; 2) Amendment 7 could be applied retroactively to records created before the passage of the amendment; and 3) portions of s. 381.028, F.S., to the extent they conflicted with Amendment 7, were unconstitutional and therefore severed from the valid provisions.

Work Product Doctrine and Attorney-Client Privilege

The balance between Amendment 7 and the attorney-client privilege and work-product doctrine has also been the subject of litigation.

Edwards v. Thomas

The Florida Supreme Court, in *Edwards v Thomas*,[19] addressed this balance. In the *Edwards* case, the trial court ordered production of external peer review reports concerning care and treatment rendered by a specific doctor under Amendment 7. The hospital petitioned for certiorari. The Second District Court of Appeal granted the petition and quashed the order in part. The patient appealed to the Florida Supreme Court, which held that 1) the constitutional right to any adverse medical incident reports in medical malpractice actions removed all limitations on discovery of adverse medical incidents; 2) external peer review reports were adverse medical incident reports; 3) on an issue of apparent first impression, external peer review reports were made or received in the course of business; 4) discovery of reports was not precluded by work product privilege, and 5) discovery of reports was not protected by attorney client privilege.[20]

Federal Preemption

Whether or not federal law has preempted parts of Amendment 7 has also been the source of litigation between health care providers and those requesting patients' records. Recent litigation has centered around the Federal Patient Safety and Quality Improvement Act.[21]

The Federal Patient Safety and Quality Improvement Act

The Federal Patient Safety and Quality Improvement Act envisions a system in which each participating health care provider or member establishes a patient safety evaluation system, in which relevant information would be collected, managed, and analyzed.[22] After the information is collected in the patient safety evaluation system, the provider forwards the information to its patient safety organization, which then collects and analyzes the data and provides feedback and

[16] Id. at 356.
[17] Florida Hospital Waterman, Inc. v. Buster, 984 So. 2d 478 (Fla. 2008).
[18] The court relied on Gray v. Bryant, 125 So.2d 846 (Fla 1960), because it established a clearly defined rule through which its rights and purpose were conveyed, which gave rise to a presumption in favor of self-execution.
[19] Edwards v. Thomas, 229 So.3d 277 (Fla. 2017).
[20] Id.
[21] The Federal Health Care Quality Act was also the source of litigation. The Florida Supreme Court in *West Florida Regional Medical Center, Inc. v. See*, 79 30 20. 3d 1 (Fla. 2012), found that the federal law in question does not preempt Amendment 7.
[22] 42 U.S.C. § 299b-21(6).

recommendations to providers on ways to improve patient safety and quality of care.[23] Information reported to patient safety organizations is also shared with a central clearinghouse, the Network of Patient Safety Databases, which aggregates the data and makes it available to providers as an "evidence-based management resource."[24]

In order to encourage participation, Congress created a protected legal environment within the federal law in which providers would be comfortable sharing data "both within and across state lines, without the threat that the information will be used against [them]."[25] Privilege and confidentiality protections attach to the shared information, termed "patient safety work product," "to encourage providers to share this information without fear of liability."[26] These protections are "the foundation to furthering the overall goal of the statute to develop a national system for analyzing and learning from patient safety events."[27]

The Florida Supreme Court in *Charles v. Southern Baptist Hospital of Florida, Inc.*, addressed federal preemption and the Federal Patient Safety and Quality Improvement Act.[28] In *Charles*, the trial court granted the plaintiff's motion to compel documents the hospital refused to produce based on a claim of privilege under the Federal Patient Safety and Quality Improvement Act. On appeal, the First District Court of Appeal (First DCA) ruled that the documents were entitled to federal protection and that the provision of the Florida Constitution (Amendment 7) granting patients access to records relating to "adverse medical incidents" was preempted by federal law.[29] On review, the Florida Supreme Court reversed the First DCA, holding that:

1. Adverse medical incident reports could not be classified as "patient safety work product" under federal law;
2. Federal law did not preempt the "patients' right to know" provision of the Florida constitution;
3. Federal law did not impliedly preempt the right-to-know provision; and
4. The documents at issue were discoverable.[30]

Also notable in the *Charles* case was the dissent, in which Justice Canady argues that the majority opinion was merely advisory since a stipulation for dismissal filed under Florida Rule of Appellate Procedure 9.350(a) before a decision on the merits is not subject to disapproval.[31] Justice Polston concurred in this dissent.

B. EFFECT OF PROPOSED CHANGES:

The proposal amends Article X, Section 25 to specify that a patients' right to know about adverse medical incidents does not abrogate attorney-client privilege or work-product doctrine available

[23] *See* Id. § 299b–24; 73 Fed. Reg. at 70,733.
[24] *See* 42 U.S.C. § 299b-23.
[25] 73 Fed. Reg. at 70,732.
[26] Id.; *see* 42 U.S.C. § 299b-22(a)-(b).
[27] 73 Fed. Reg. at 70,741.
[28] Charles v. Southern Baptist Hospital of Florida, Inc., 209 So.3d 1199 (Fla. 2017).
[29] Southern Baptist Hospital of Florida, Inc., v. Charles, 178 So.3d 102 (Fla. 1st DCA 2015).
[30] *See* Charles v. Southern Baptist Hospital of Florida, Inc., 209 So.3d 1199 (Fla. 2017)
[31] Id. at 1217.

under law. The effect of the amendment appears to abrogate the decisions of the Florida Supreme Court in *Edwards v. Thomas*.

The proposal also provides that a health care facility or health care provider that violates the requirements of Article X, Section 25 may be subject to administrative discipline as provided by law.

If approved by the voters, the proposal will take effect on January 8, 2019.[32]

C. FISCAL IMPACT:

None.

III. Additional Information:

A. Statement of Changes:

(Summarizing differences between the current version and the prior version of the proposal.)

The proposal was amended on 1/12/18 by the General Provisions Committee. The amendment struck language that abrogated the decision in *Charles v. Southern Baptist Hospital of Florida, Inc.*, and added language that provides that a healthcare provider may subject to administrative discipline as provided by law if the provider violates the requirements of Article X, Section 25 of the Florida Constitution.

B. Amendments:

The proposal was amended by the General Provisions Committee on 1/12/18.[33]

C. Technical Deficiencies:

None.

D. Related Issues:

None.

[32] *See* FLA. CONST. ART XI, S. 5(E) (1968) ("Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.)

[33] *See* Amendment Barcode 588206 filed by Commissioner Gainey and approved by the General Provisions Committee: http://www.flcrc.gov/Proposals/Commissioner/2017/0099/Amendment/588206/PDF (last visited 1/29/18).