Constitution Revision Commission
General Provisions Committee
Proposal Analysis

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

Proposal #: P 99

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

Introducer(s): Commissioner Cerio

Article/Section affected: Article X, section 25

Date: December 18, 2017

	REFERENCE	ACTION
1.	GP	**Pre-meeting**
2.	DR	

I. SUMMARY:

Section 25 of Article X of the Florida Constitution, commonly known as Amendment 7, allows patients to access any records of a health care facility relating to any adverse medical incidents.

Florida courts have historically interpreted Amendment 7 broadly in favor of disclosure of records, including in regard to federal protections and attorney work product.

This proposal specifies that the patients' right to know about adverse medical incidents does not abrogate attorney-client communications or work product privileges for patients, health care providers, and health care facilities. This proposal also revises the definition of the term "adverse medical incident" to exclude records that are protected by federal law or regulations relating to patient safety quality improvement.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Overview

Section 25 of Article X 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 "a right to have access to any records made or received in the course of

[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).

business by a health care facility or provider relating to any adverse medical incident."[2] "Adverse medical incident" is defined broadly to include "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 . . . ."[3] 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 stated that the purpose of Amendment 7[4] "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.' "[5] 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.

Florida Hospital Waterman, Inc. v. Buster case (*Buster* Case)

One of the first and most important Florida Supreme Court cases to interpret Amendment 7 was the *Florida Hospital Waterman, Inc. v. Buster* case.[6] The *Buster* case involved three questions, whether the amendment:

1. Was self-executing, or required enabling legislation;
2. Preempted well established statutory immunities, or was it merely supplementary; and
3. Applied retroactively or prospectively.[7]

In *Buster*, the plaintiff 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.[8] The hospital objected and filed for a protective order, and 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).[9] On appeal, the Fifth DCA held that 1) Amendment 7 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;[10] 2) did not apply retroactively; and 3) was self-executing. The Fifth District Court of Appeal anticipated conflicts with other districts and certified these holdings in the form of questions to the Florida Supreme Court for review.[11]

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[2] Section 25(a) of Art. X, Fla. Const.
[3] Section 25(c)(3) of Art. X, Fla. Const.
[4] Florida Hospital Waterman, Inc. v. Buster, 984 So. 2d 478 (Fla. 2008).
[5] 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)).
[6] Florida Hospital Waterman, Inc. v. Buster, 984 So. 2d 478 (Fla. 2008).
[7] Id.
[8] Id.
[9] *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.
[10] Id. at 349.
[11] Id. at 356.

On review of the *Buster* case, the Florida Supreme Court took a very expansive reading of the terms in Amendment 7.[12] The court held that: 1) Amendment 7 was self-executing, and did not require a statute to implement its terms[13]; 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.

Federal Preemption of Amendment 7

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 Patent Safety and Quality Improvement Act.[14]

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.[15] 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 recommendations to providers on ways to improve patient safety and quality of care.[16] Information reported to patient safety organizations is also shared with a central clearing house, the Network of Patient Safety Databases, which aggregates the data and makes it available to providers as an "evidence-based management resource."[17]

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]."[18] 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."[19] 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."[20]

[12] Florida Hospital Waterman, Inc. v. Buster, 984 So. 2d 478 (Fla. 2008).
[13] 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.
[14] 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.
[15] 42 U.S.C. § 299b-21(6).
[16] *See* Id. § 299b–24; 73 Fed. Reg. at 70,733.
[17] *See* 42 U.S.C. § 299b-23.
[18] 73 Fed. Reg. at 70,732.
[19] Id.; *see* 42 U.S.C. § 299b-22(a)-(b).
[20] 73 Fed. Reg. at 70,741.

The Charles Case

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.[21] 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.[22] 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.[23]

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.[24] Justice Polston concurred in this dissent.

Amendment 7 and Attorney Client Privilege/Work Product

The balance between Amendment 7 and attorney client privilege and work product privilege has also been the subject of litigation. The Florida Supreme Court, in *Edwards v Thomas*,[25] 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.[26]

[21] Charles v. Southern Baptist Hospital of Florida, Inc., 209 So.3d 1199 (Fla. 2017).
[22] Southern Baptist Hospital of Florida, Inc., v. Charles, 178 So.3d 102 (Fla. 1st DCA 2015).
[23] *See* Charles v. Southern Baptist Hospital of Florida, Inc., 209 So.3d 1199 (Fla. 2017)
[24] Id. at 1217.
[25] Edwards v. Thomas, 229 So.3d 277 (Fla. 2017).
[26] Id.

EFFECT OF PROPOSED CHANGES:

This proposal adds to the definition of "adverse medical incident" by providing that information protected by federal laws or regulations relating to patient safety quality improvement is not required to be reported pursuant to Amendment 7. Also, the proposal amends Amendment 7 to provide that Amendment 7 does not abrogate attorney-client communications or work product privileges for patients, health care providers, or health care facilities.

B. FISCAL IMPACT:

None.

III. Additional Information:

Statement of Changes:

None.

A. Amendments:

None.

B. Technical Deficiencies:

None.

C. Related Issues:

None.