

January 2009

PATIENT'S RIGHT TO KNOW
By Ted Babbitt

The medical establishment took on the trial lawyers in an attempt to insulate themselves from liability by proposing a constitutional amendment which severely limited fees that could be earned in medical malpractice cases. The trial lawyers retaliated with an amendment to the Constitution requiring the production of peer review materials, despite existing statutes which prohibited such production. Both sides won but the trial lawyers were able to circumvent the medical establishment's constitutional amendment by asking clients to waive their constitutional rights. Doctors and hospitals, however, are living their worst nightmare because of the patient's right to know amendment which exposes disciplinary records of physicians in a hospital setting and facilitates suits against hospitals based on failure to properly credential a physician.

Physicians and hospitals successfully obtained legislation which essentially negated Article X, Section 25 by severely limiting those who could receive medical incident information. The Supreme Court found those statutes unconstitutional in Fla. Hosp. Waterman, Inc. v. Buster, 984 So. 2d 478 (Fla. 2008).

In Amisub North Ridge Hospital, Inc. v. Sonaglia, 33 Fla. L. Weekly D2477 (Fla. 4th DCA, Oct. 22, 2008), virtually all defenses to the production of these documents were obliterated. That case involved a suit between two doctors alleging that one defamed the other and tortiously interfered with her business

relationship with the hospital in order to get her thrown off the hospital's medical staff and thus take patients from her. The plaintiff, in that suit, obtained an affidavit from a patient whom the plaintiff had treated stating that the patient had learned that the defendant had removed her as a patient of the plaintiff and instead listed her as one of his own patients and had fraudulently stated that he had examined her. She requested peer review materials regarding the defendant which were in the hands of the appellant hospital. The circuit court entered an order requiring production despite the claims of the defendant that this was not a "proper purpose" for the production of peer review materials under Amendment 7. The hospital joined in the objection alleging that the affiant was not a "proper patient representative" under the Amendment and was, thus, not entitled to records. The Fourth District rejected both arguments holding that there was no requirement of "standing" in Amendment 7 nor was there any basis to engraft a "proper purpose" requirement on to the Amendment.

Relying on Waterman, *supra*, the appellate court painted with a broad brush as to who had a right to request peer review materials and what materials had to be provided.

"As construed by *Waterman*, Amendment 7 removed any barrier to a patient's discovery of adverse medical incident information, including the peer review protections provided by the statute. *Waterman* expressly found that the legislature's attempts in section 381.028, Florida Statutes (2005), to limit the applicability of Amendment 7 were unconstitutional, including those sections purporting to exclude 'existing privilege statutes' from the reach of the amendment. *Id.* at 492-93.

After *Waterman's* construction of Amendment 7, the hospital has no basis in this case to contest the production of peer review materials that relate to an adverse medical incident. Daley is a patient under Article X, Section 25(c)(2). the amendment does not limit the definition of a 'patient' to one seeking the information for any type of 'proper purpose.' The amendment does not require the information a patient seeks to be relevant to a pending medical malpractice action or to a medical care decision. See *Morton Plant Hosp. Ass'n v. Shahbas*, 960 So. 2d 820, 825 (Fla. 2d DCA 2007) (holding that Amendment 7 contains no requirement that records sought be relevant to any pending litigation).

Statutes precluding production of peer review materials by establishing a privilege which prevented that production have been neutered, if not eliminated, by the passage of this constitutional amendment. This amendment created a sea change with respect to both a plaintiff and the public's right to know about the misdeeds of physicians and hospitals. The appellate court in this case makes it clear that virtually anyone can obtain those kinds of records and reveal their content to the press or to anyone else. At Page D2478, the Court held:

Amendment 7 does not limit the persons to whom a patient can reveal information once obtained. Thus, Daley's request to furnish the materials to Sonaglia's lawyer was not improper. Daley does not seek disclosure of materials that do *not* relate to an adverse medical incident. We recognize that there are sound policy reasons for limiting access to peer review materials; however, as the Supreme Court recognized in *Waterman*, 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' in favor of patients.' 984 So. 2d at 494.

It has been said that "sunshine is the best antiseptic." The passage of Amendment 7 not only gave plaintiffs a leg up in malpractice suits but provided the vehicle that allows the public to investigate what kinds of problems exist about physicians who patients potentially employ to treat them. It does not take much imagination to predict that there will soon be a website which anyone can access to obtain information about every physician in the State of Florida. This case opens the door to that kind of public dissemination which may result in turning what was initially intended as a retaliatory amendment into the greatest public service that trial lawyers have ever performed.

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