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**AMENDMENT 7 – LET THE SUN SHINE  
by Ted Babbitt**

Until the passage of Amendment 7, the misdeeds of Florida's hospitals and physicians have been shrouded in secrecy. Florida's Legislature long ago gave patients a right of action under Fla. Stat. 766.110 for the negligent credentialing, retaining or supervising of physicians but actions brought under that statute were virtually impossible to prosecute because of the restrictions imposed by the Legislature to access to information kept by the hospitals in their credentials committees, risk management committees, peer review committees, medical review committees or quality assurance committees. Florida Statutes 395.0193(8) and 766.101(5) exempted all records of any investigations, proceedings, or the internal records of peer review panels from discovery. The interpretation of those statutes by the Courts have been extremely restrictive. See, e.g., Cruger v. Love, 599 So. 2d 111, 114 (Fla. 1992) and Holly v. Auld, 450 So. 2d 217 (Fla. 1984). In Holly, supra, at Page 220, the Supreme Court required the protection of privileged documents while recognizing that doing so impinged on the rights of civil litigants to discovery which might well be essential to their causes of action.

Proponents of access to adverse incident information about hospitals and doctors are fond of saying that sunshine is the best antiseptic to poor medical care. Common sense dictates that widely disseminated information about physician and hospital misdeeds would dissuade patients from seeking medical

care from those health care providers. In New York when adverse information concerning cardiologists was released to the public, subsequent incidents of morbidity and mortality were drastically curtailed.

Attempts to open the door of secrecy through statutory enactment have consistently failed. In the general election of November, 2004, voters overwhelmingly approved Amendment 7, "The Patient's Right to Know" Amendment. That passage resulted in the Legislature creating Fla. Stat. 381.028 which purported to "implement" the amendment. The combination of the constitutional amendment and the statute spawned innumerable circuit court interpretations. Two District Courts have now joined the fray over the interpretation of the amendment and the statute.

In Notami Hospital of Florida, Inc. v. Bowen, 31 Fla. L. Weekly D1110 (Fla. 1<sup>st</sup> DCA, April 21, 2006), the First District concluded that Fla. Stat. 381.028 unconstitutionally restricted rights contained within Amendment 7 which is now codified as Article X, Section 25. The First District held that Amendment 7 should be retroactively applied to incidents and records which predated its passage because there was no vested right in maintaining confidentiality in adverse medical incidents. The First District also held that Amendment 7 was self-executing.

In Florida Hospital Waterman, Inc. v. Buster, 31 Fla. L. Weekly D763 (Fla. 5<sup>th</sup> DCA, March 10, 2006), the Fifth District joined the First District in holding Fla. Stat. 381.028 impermissibly unconstitutional and concluded that Amendment 7 was self-executing. The Fifth District, however, drew an opposite conclusion

from the First District on the issue of retroactivity, concluding that retroactive application of the amendment would be unconstitutional because it would interfere with the vested right of health care providers to the confidentiality of information generated through the self-evaluative process.

One of these opposing conclusions will be ultimately chosen by the Supreme Court because conflict was certified by the Notami Court and the Florida Hospital Waterman Court certified question on this subject to the Supreme Court.

The issue of retroactivity is obviously important. If only records created after November 2, 2004, are discoverable after doctors and hospitals were put on notice that access to those records would likely be public, one could surmise that greater caution would be exercised by health care providers in the creation of records.

The Notami Court's conclusion that those voting for the amendment intended its operation to be retrospective as to existing records is bolstered by the fact that the amendment allows access to "any adverse medical incident" and defines a "patient" as meaning "an individual who has sought, is seeking, is undergoing or has undergone care or treatment in a health facility or by a health care provider."

As to the issue of whether vested rights would be impaired by a retrospective application of this statute, the Notami Court held at Page D1111:

"A statute is not unconstitutionally retrospective in its operation unless it impairs a substantive, vested right.' *Clausell v. Hobart Corp.*, 515 So.

2d 1275, 1276 (Fla. 1987). However, '[t]o be vested a right must be *more than a mere expectation based on an anticipation of the continuance of an existing law...*' *Id.* (quoting *Div. of Workers' Comp. v. Brevda*, 420 So. 2d 887, 891 (Fla. 1<sup>st</sup> DCA 1982)) (emphasis added). Here, the Hospital does not have a vested right in maintaining the confidentiality of adverse medical incidents. The Hospital's 'right' is no more than an expectation that previously existing statutory law would not change. Because the Hospital's expectation is not a vested, substantive right, applying Amendment 7 to records created prior to its passage is not unconstitutionally retrospective."

In Florida Hospital Waterman, *supra*, the Fifth District justifies its prospective application of the amendment on its analysis of the law regarding statutory retroactive application arguing that in looking at the provisions of Amendment 7, there must be a clear indication of an intention to apply the amendment retroactively in the language of the amendment itself. The Fifth District concludes that there is nothing in the amendment to justify such an interpretation and the fact that it was approved by the electorate with a specific provision that its effective date would be November 2, 2004, belies the argument that it should be retroactively applied.

The opposite conclusions of the First and Fifth District leaves the question of retroactive application up in the air but the joint conclusion of both District Courts that Amendment 7 is self-executing and that Fla. Stat. 381.028 is unconstitutional leaves little doubt that the amendment will be available to litigants to require production of hitherto secret information concerning adverse

medical treatment. This is a sea change in the law of Florida. As the Fifth District said in Florida Hospital Waterman at Page 773:

“We believe that 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.”

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