

September 2009

DOCTORS STILL FIGHTING DISCLOSURE
By Ted Babbitt

Doctors and lawyers engaged in a death struggle over constitutional amendments a few years ago and the public resoundingly approved restrictions on attorney's fees in malpractice cases that would have been the death knell for just about any case. However, lawyers, apparently more clever than their physician counterparts, got around the doctor's attempts at insulating themselves from medical malpractice lawsuits by simply having clients waive their constitutional rights to the ultra restrictive fee schedule set out in the constitutional amendment.

Ironically, lawyers fostered and got the public to resoundingly approve Amendment 7 which took away virtually every privilege previously existing with respect to peer review of physicians and hospitals. Doctors and hospitals have used every tool known to them to resist handing over the previously secret records of their self-discipline and over and over again Courts have upheld Amendment 7 and compelled production of adverse medical incident reports.

In Columbia Hospital Corp. of South Broward v. Fain, 34 Fla. L. Weekly D1223 (Fla. 4th DCA, June 17, 2009), the result was no different. There, the trial court overruled virtually every objection to the production of medical incident reports in the possession of the Defendant hospital and the hospital sought a writ of certiorari quashing the trial court's order. The hospital raised issues of relevance, burdensomeness, and claimed the requests were overbroad. The

appellate court rejected each of those arguments citing the Supreme Court opinion of Florida Hospital Waterman, Inc. v Buster, 984 So. 2d 478 (Fla. 2008) wherein the Supreme Court found unconstitutional a Florida Statute which the doctors had managed to pass placing strict limits on what could or could not be compelled under Amendment 7. The District Court found that the Florida Hospital Waterman case, supra, together with the Amendment itself makes a request under Amendment 7 different than any other discovery request in that no request under it can be denied on the grounds that it is overbroad, irrelevant or burdensome.

The Court also held that the hospital cannot pick and chose the type of record that it must produce. At 1225 the Court held:

Columbia also argues that language in section 381.028(7)(b)1 limits the types of records that it may be required to produce and provides the sole method through which the hospital must identify records of adverse medical incidents. Columbia's argument that pursuant to this statute it must provide only certain reports ('Code 15' reports under section 395.0197) is expressly contrary to the amendment. The amendment provides that it is '*not limited to*' incidents that already must be reported under law. Art. X sec. 25(c)(3), Fla. Const. (emphasis supplied). As the Florida Supreme Court held in *Buster*, the legislature may not limit the scope of discoverability of adverse incident reports in a manner inconsistent with the amendment. Columbia's argument calls for an unconstitutional application of the statute.

As a fall back position, the hospital took the position that Amendment 7 was Federally preempted by the passage of the Health Care Quality Improvement Act of 1986, the design of which was to foster effective peer review.

The hospital argued that by allowing production of peer review, it was rendered ineffective. At 1225, the Court held:

Columbia's argument boils down to the claim that peer review cannot be 'effective' if the discovery protections previously afforded by Florida's statutes are abrogated by Amendment 7. In *Buster*, the Florida Supreme Court made clear that the limited discovery protections previously afforded by Florida's statutes were effectively abolished by the passage of Amendment 7 as far as adverse medical incidents are concerned. 984 So. 2d at 488-89).

Lastly, the hospital argued that Amendment 7 was unconstitutional because it impaired the contracts it had with doctors which specifically called for confidentiality. The Fourth District quickly disposed of that argument also on the basis of Buster, supra, which had rejected the same argument because doctors do not have a vested statutory right to keep peer review materials secret.

The adage that "sunshine is the best medicine" may well apply to the public's right to know when a doctor has been disciplined or a hospital has an unusual amount of medical malpractice. Courts continue to hold that Amendment 7 means exactly what it says and virtually no argument has been successful to prevent disclosure of medical peer review, incident reports, or any other documents which disclose previous negligent conduct within a hospital.

NOTE: BECAUSE A NUMBER OF PEOPLE HAVE REQUESTED COPIES OF PAST ARTICLES, A COMPILATION OF THESE ARTICLES IS NOW AVAILABLE TO MEMBERS OF THE PALM BEACH COUNTY BAR ASSOCIATION, FREE OF CHARGE, BY CALLING (561) 684-2500.