

Amendment 7 to the Florida Constitution

Article 10 Section 25 of Florida's Constitution (known informally as Amendment 7):
SECTION 25. Patients' right to know about adverse medical incidents.—

(a) In addition to any other similar rights provided herein or by general law, patients have a right to have access to **any records made or received** in the course of business by a health care facility or provider **relating to any adverse medical incident**.

(b) In providing such access, the **identity of patients involved in the incidents shall not be disclosed**, and any privacy restrictions imposed by federal law shall be maintained.

(c) For purposes of this section, the following terms have the following meanings:

(1) The phrases "health care facility" and "health care provider" have the meaning given in general law related to a patient's rights and responsibilities.

(2) The term "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 "adverse medical incident" means 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, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees.**

(4) 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.

Florida Hosp. Waterman v. Buster, 984 So.2d 478 (Fla. 2008). "This language and parallel language in other parts of the amendment and ballot summary make it abundantly clear that the chief purpose of amendment 7 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." *Id.* In other words, while this history was not previously accessible, it became accessible when the electorate approved a constitutional override of the prior statutory restrictions. The central focus of the amendment was to provide access to records that existed but were not accessible due to statutory restrictions. *489 The language of the amendment could hardly have been more specific or articulate in expressing the intent that what was not accessible before would be accessible with the passage of the amendment."

This means Title Seven trumps statutory privileges such as (see the list below): The catch is it needs to relate to an "adverse medical incident." The defense will almost always argue that whatever you are requesting isn't related to an adverse medical incident. Look at the definition and governing case law. Remember the amendment is aimed at the patient's right to know about adverse medical incidents, so the hospital is required to turn over all reports of adverse incidents and all documents relating to adverse incidents, if requested. The documents do not need to be relating to pending litigation.

- You always have a right to the adverse medical incident report.

Edwards v. Thomas, 229 So.3d 277 (Fla. 2017):

Constitutional right to any adverse medical incident reports in medical malpractice actions removed all limitations on discovery of adverse medical incidents;
External peer review reports were adverse medical incident reports;
External peer review reports were made or received in the course of business;
Discovery of reports was not protected by work product privilege; and
Discovery of reports was not protected by attorney-client privilege.

Edwards v. Thomas is essentially saying when it comes to the actually written report of the adverse incident report no privileges apply.

- While Amendment 7 overrides statutory privileges, you have to look at if the information requested is a business record relating to an adverse medical incident. The following is a list of some of the statutory privileges afforded to medical providers:

395.0191 Staff membership and clinical privileges

395.0193 Peer Review

395.0197 Risk Management

395.3025 Patient and personnel records

766.1016 Patient safety data privilege

766.101 Medical Review Committee

The following is case law that discusses the application of amendment 7 to discovery issues:

Palms of Pasadena Hospital v. Rutigliano, 908 So.2d 594 (Fla. 5th DCA 2005). (this case upheld the privilege of who is on the credentialing committee.)

“Identities of the members of hospital's credentials committee were privileged and immune from discovery by personal representative of deceased patient, in action against the hospital alleging that hospital negligently granted hospital privileges to physician who negligently treated the patient.”

Bartow HMA, LLC v. Kirkland, 126 So.3d 1247 (Fla. 2d DCA 2013).

- Under Amendment 7, a patient is entitled to any of the hospital's records relating to any adverse medical incident and there is no requirement that the records be relevant to any pending litigation.
- Whether the request for production of documents is overly burdensome is not a relevant consideration under Amendment 7 provision for disclosure of adverse medical incidents.
- Amendment 7 provision for disclosure of adverse medical incidents requires the hospital to protect the identity of patients, and thus an objection based on the violation of a patient's right of privacy normally will not preclude production unless the trial court's order requires a hospital to produce documents of other patients without redacting their private information.
- Amendment 7 provision for disclosure of adverse medical incidents trumps the application of the statutory discovery protections to the extent that documents for which those protections are asserted contain reports of adverse medical incidents.
- A patient's entitlement to documents relating to adverse medical incidents under Amendment 7 is not preempted by federal law in the form of the Healthcare Quality Improvement Act (HCQIA).
- Amendment 7 provision for disclosure of adverse medical incidents does not require production of documents relating to general policies and procedures of health care facility peer review, risk management, quality assurance, credentials, or similar committees or other documents that do not contain information about particular adverse medical incidents.
- The trial court departed from the essential requirements of law when it ordered the blanket production of all items identified in hospital's logs, in malpractice case against hospital in connection with a cholecystectomy; the trial court was required to determine, through in camera review, whether the items in the logs

related to an adverse medical incident, as there were multiple reasons for conversion from the laparoscopic method to the open method of surgery for a cholecystectomy that did not arise from medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility.

TIP: The defense might try to argue that a case says something you requested does not come in under Amendment 7 and therefore you are not entitled to it. Remember Amendment 7 is only to bypass privileges regarding documents related to adverse incidents. If an item is not protected by a privilege, like general policies and procedure, then that argument is irrelevant. However, if you are asking for policies and procedures of healthcare facility peer review, risk management, quality assurance, credentials, etc, those policies and procedures would fall under statutory privileges.

Morton Plant Hospital Assc. Inc. v. Shahbas, 960 So.2d 820 (Fla. 2d DCA 2007) held:

- Under state constitutional amendment, patient was entitled to records relating to any adverse medical incident, regardless of whether records were irrelevant to medical malpractice claim;
- Whether a request is overly burdensome is not a relevant consideration under constitutional amendment;
- Records that trial court compelled hospital to disclose did not violate state and federal privacy rights of other patients; and
- Request for records regarding doctor's credentialing and recredentialing did not relate to "adverse medical incidents."

TIP: You are not entitled to the credentialing file and you are not entitled to know what documents are within the credentialing file, but as long as a document exists independently of the credentialing file you can have the document. Placing something in a credentialing file does not forever make it privileged.

West Florida Regional Medical Center, Inc. v. See, 18 So.3d 676 (Fla. 1st DCA 2009).

- Statutory protection against discovery of records created by peer review and credentialing committees did not apply to blank applications for medical staff privileges.

TIP, ask for the blank forms to learn what they ask for and then address this in your depositions.

Lakeland Regional Medical Center v. Neely, 8 So.3d 1268 (Fla. 2d 2009).

- The District Court of Appeal, held that constitutional amendment giving patients right to know about adverse medical incidents required, notwithstanding common

law work product doctrine, disclosure of existing reports of adverse medical incidents prepared in anticipation of litigation by health care professionals. TIP, there is no “work product” nor “prepared in anticipation of litigation” privilege for Title Seven.

Bartow v. Kirkland, 171 So.3d 783 (Fla. 2d DCA 2015).

This decision is a follow-up the previous Bartow decision. In the first Bartow case the court ruled that it is improper to order the blanket production of documents and that the trial court must conduct an in camera review of the documents listed on the privilege log to determine if the documents relate to an adverse medical incident, thus abrogating the privileges. The second Bartow decision sets forth guidelines to assist the trial court in making its determination of whether the requested documents relate to an adverse incident and whether the privileges claimed are preempted by Amendment 7.

The Court in *Bartow* set for the procedure for the trial court to follow:

- 1) Require the defense to prepare a privilege log, and produce everything;
- 2) Conduct an in camera review of all documents;
- 3) The court is to then list each document and delineate whether it is subject to discovery under Amendment 7 or, if not, whether it is subject to protection from disclosure under the various statutes;
- 4) If the trial court determines that a portion of a document is not discoverable under Amendment 7 and is protected by statute, it should require redaction of that portion of the document.