

Peer Review

Hospitals Must Give Florida Patients External Peer Review Reports

Peer review reports written by outside entities retained by hospitals to evaluate adverse medical incidents are discoverable in civil litigation under Florida law.

The Florida Supreme Court Oct. 26 said the Florida Constitution's Amendment 7 gives medical malpractice plaintiffs, and patients generally, the right to access external peer review reports as well documents produced during a hospital's internal peer review process (*Edwards v. Thomas*, 2017 BL 385054, Fla., No. SC15-1893, 10/26/17).

The decision highlights the tension between health-care quality advocates and patients' attorneys, who disagree on whether peer review documents need to be kept confidential in order to encourage candor during internal peer review proceedings, or should be made available to ensure patients have access to the truth about their health care.

The degree to which state laws shield this information from discovery varies throughout the country. Florida's Amendment 7 is unique, so the decision may not have much influence outside the state.

Still, an attorney who regularly litigates challenges to laws impeding access to courts praised the decision. "The Florida Supreme Court correctly recognized that passing information through an external committee or a lawyer does not immunize it from disclosure under Florida's Constitution," Robert S. Peck, president of the Center for Constitutional Litigation PC in New York, told Bloomberg Law.

"Instead of hiding problems, perhaps the medical community will recognize and correct them," he said.

Big Win for Floridians The court broadly construed Amendment 7's language and concluded that it requires a health-care provider to produce any records related to any adverse medical incident. It also said the external records at issue in this case were developed in the regular course of the hospital's business and weren't shielded by the attorney work product doctrine.

This is a "big victory" for all Floridians, not just medical malpractice plaintiffs, Matthew Schwencke, an attorney with Searcy Denney Scarola Barnhart & Shipley in West Palm Beach, Fla., told Bloomberg Law.

Amendment 7 gives all Florida citizens a right learn about adverse medical incidents involving any provider, Schwencke said. That means people can ask for—and

receive—documents discussing doctors or hospitals they are considering consulting or whom they merely suspect of negligently treating them, in addition to information about providers they have sued.

Schwencke is representing plaintiff Amber Edwards in the medical malpractice case underlying the decision. He said the case has been active for nearly four years, and he still hasn't seen the external peer review records.

'Gamechanger' Plaintiffs have fought hard to get access to adverse incident reports, Schwencke said. Amendment 7 has been around since 2004, and there have been between 10 and 20 cases construing the provision. This decision "is a gamechanger," he said, because the court clearly addressed every argument providers have used to avoid producing this information. It "put the issue to bed," he said.

The extent to which the adverse incident reports produced in discovery will be admissible at trial still is a "gray area," Schwencke said.

Once attorneys have access to the information contained in the reports, however, they will be able to use it to formulate discovery requests for facts and to cross-examine witnesses. Reports might or might not be admissible, but more importantly will be available to help attorneys and courts search for the truth, Schwencke said.

Schwencke told Bloomberg Law he asked the trial court to schedule the case for trial shortly after learning about the state supreme court's decision. He said he expects a trial date to be set for the first half of 2018.

An attorney for the hospital declined to comment.

Bartow Regional Medical Center in Bartow, Fla., is now owned by BayCare Health System, but was owned and operated by Health Management Associates at the time of the alleged malpractice. Community Health Systems of Franklin, Tenn., acquired BRMC in 2014, and later sold the hospital to Bartow.

Amendment Did Away With Shield Amendment 7, Fla. Const. art. X, § 25, was intended to eliminate prior state laws that restricted patients' access to medical providers' records. The amendment was intended "to lift the shroud of privilege and confidentiality" surrounding adverse medical incidents, a 2006 appeals court decision said.

The issue arose in this case after Edwards sued Larry Thomas and the hospital, alleging Thomas committed medical negligence when he cut her common bile duct during a laparoscopic surgery. During discovery, Edwards sought the hospital's records related to adverse medical incidents.

The hospital refused to produce what it said were attorney-requested peer review reports produced by an outside entity. The trial court ordered the hospital to produce the reports, but the appeals court said the records weren't discoverable. The state supreme court disagreed.

Justice R. Fred Lewis wrote the opinion. Justice C. Alan Lawson, joined by Justice Charles T. Canady, dissented. Lawson argued that the attorney work product shielded the external peer review records from discovery because the outside review was requested by the

hospital's legal counsel. The report wasn't made in the regular course of the hospital's business, he said.

Methe & Rockenbach PA represented Edwards. McCumber, Daniels, Buntz, Hartig & Puig PA represented Thomas and Bartow.

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