THE AMENDMENT 7 DECADE: TEN YEARS OF LIVING WITH A "PATIENT'S RIGHT TO KNOW" IN FLORIDA

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Ten years ago, privilege and protections surrounding peer review, credentialing, event investigations, quality assurance, and risk management enjoyed by Florida health care providers fell victim to political feuding and maneuvering when medical malpractice trial lawyers clashed with Florida's physicians, causing the loss of long-held statutory protections. A constitutional ballot measure initiated by a

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manufactured grassroots public interest group, or "Astroturf" organization, effected an unnecessary and rash public policy change never actually envisioned or sought out by Floridians. A 2013 survey of Florida hospital risk managers provides an updated look at how this contrived ballot measure, commonly known as "Amendment 7," initiated a decade-long erosion of Florida's hospitals' and physicians' self-policing protections and how it continues to be misrepresented and manipulated by the trial bar today.

INTRODUCTION

On November 2, 2004, Floridians fell victim to a well-orchestrated and deceptive "trick play" in the volatile game of medical malpractice tort reform. This scheme enlisted the help of unwitting Florida voters who likely assumed they were advancing a consumer information initiative, but instead they were being duped by a very narrow special interest group into a reckless undermining of patient safety.

Through a contrived grass-roots or "Astroturf"[1] organization called "Floridians for Patient Protection" and the expenditure of millions of dollars, the Academy of Florida Trial Lawyers (AFTL), Florida's plaintiff trial lawyers' group[2] took advantage of the state's ballot initiative process to advance a self-preserving and self-serving business strategy. In an attempt to respond tactically to Florida's physicians seeking restrictions on lawyers' fees in medical malpractice cases, AFTL composed a state constitutional amendment entitled the "Patients' Right-To-Know About Adverse Medical Incidents" which came to be known by its ballot number, "Amendment 7."[3] The fallout of this tactic was that, by passing Amendment 7, voters naively caused serious damage to Florida's statutory self-regulation protections which had been

1. The term "Astroturf" is used to describe the practice of disguising the patrons of a political, marketing, or public relations message to give the false impression that the message came from a legitimate grassroots organization. By withholding information such as its true source of funding, the Astroturf organization can mimic the believability of an entity that stemmed from an unplanned expression of public opinion. Jonathan C. Zellner, Note, *Artificial Grassroots Advocacy and the Constitutionality of Legislative Identification and Control Measures*, 43 CONN. L. REV. 357, 361–63 (2010). Four-term U.S. Senator from Texas, Lloyd Bentsen, is often credited with coining the term. In 1985, while complaining about the "mountain of cards and letters" he received in support of an insurance law provision, Bentsen is said to have quipped: "A fellow from Texas can tell the difference between grassroots and Astroturf." Alex Wade, *Good and Bad Reviews: The Ethical Debate Over 'Astroturfing*,' GUARDIAN, Jan. 9, 2011, http://www.theguardian.com/media-tech-law/astroturfing-posting-fake-reviews.

2. This group has since changed its name to the Florida Justice Association. *Who We Are*, FLORIDA JUSTICE ASSOCIATION, https://www.floridajusticeassociation.org/index.cfm?pg=WhoWeAre (last visited Sept. 21, 2014).

3. FLA. CONST. art. X, § 22.

legislatively enacted and judicially enforced for over thirty years.[4]

A decade later, many in the plaintiff's bar are still misrepresenting the retaliatory, self-serving original purpose behind Amendment 7. Citing the fact that the misrepresented amendment was passed by Florida's voters, some plaintiff's trial lawyers continue to perpetuate the myth that Amendment 7 was a true consumer information ballot measure brought by an actual progressive, grass-roots consumer group.

This Article will detail the original intent behind Amendment 7 by reviewing the factual history of how it was invented by trial lawyers, maneuvered onto the 2004 ballot, and used to finagle Florida voters into making it law. The results of a 2013 survey sent to Florida hospital risk managers, the professionals who are primarily responsible for handling litigation document requests under Amendment 7, will be examined to illustrate the Amendment's non-use as a consumer information tool for making health care decisions. The survey provides evidence that the Amendment is first and foremost used as a malpractice litigation tool by plaintiff trial lawyers seeking previously undiscoverable but leverageable evidence to force more favorable settlements. A call for action in the name of public health and patient safety is made to eliminate this reckless and unwarranted amendment to Florida's State Constitution.

I. THE MEDICAL MALPRACTICE FEUD AND THE CONSTANT BATTLE OVER NON-ECONOMIC DAMAGES

To better appreciate how something as reasonless and unwarranted as the enactment of Amendment 7 could come to pass, it must be understood that Florida's plaintiff trial lawyers and physicians have been engaged in something akin to a blood feud over medical malpractice tort reform for the past forty plus years.[5] Like most feuds, it has been fueled by both parties' intense feelings of insult and resentment, and long-running cycles of vengeful retribution.[6] Millions of dollars have been spent by both sides fighting this feud,[7] and even more words and opinions have been

4. Comprehensive Medical Malpractice Reform Act, FLA. STAT. § 769.133 (1975).

5. *See generally* Michelle M. Mello et al., *The New Medical Malpractice Crisis*, 348 NEW ENG. J. MED. 2281, 2281–83 (2003).

6. Andrew Jay McClurg, *Fight Club: Doctors vs. Lawyers – A Peace Plan Grounded In Self-Interest*. 83 TEMP. L. REV. 309, 310–30 (2011).

7. For example, in 1988, it was estimated that $14 million was spent in total by lawyers and physicians on the 1988 constitutional amendment seeking to cap non-economic damages. Diane Hirth, *Big Money Finances Amendment 10 Lawyers, Doctors Dig Deep to Support Fight on Jury Awards*, SUN SENTINEL (Fla.), Nov. 6, 1988, http://articles.sun-sentinel.com/1988-11-06/news/8803050250_1_law-firms-amendment-limit. Over $27.7 million in contributions were made to FPP to support its efforts in the 2004 ballot initiatives. *See Campaign Finance Activity of Floridians for Patient Protection in 2004*, FLORIDA DIVISION OF ELECTIONS, election.dos.state.fl.

generated, arguing every conceivable angle of the malpractice tort reform debate. Both sides have formed political action committees and engaged in relentless lobbying for and against medical malpractice tort reform.[8] Four separate government "task forces" have been formed in the last forty years to resolve Florida's recurring medical malpractice "crises," none of which led to any permanent resolution.[9] Endless tinkering with medical malpractice statutes has resulted in compromise laws that either have no appreciable effect on the issues, or in litigation that eventually caused the statutory reforms to be undone by the courts.[10] Both parties have

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us/initiatives/initiativelist.asp (last visited Sept. 22, 2014) [hereinafter DIVISION OF ELECTIONS] (select "2004" under "year" and "passed/defeated" under "status," and then select "run query," select "Floridians for Patient Protection" under "sponsor," select "Campaign Finance Activity").

8. In 1984, the proposed amendment to the Florida Constitution was titled "Citizen's Rights in Civil Actions," which aimed to place a cap of $100,000 on non-economic damages. *See* Evans v. Firestone, 457 So. 2d 1351, 1353 (Fla. 1984). In response, the "Floridians Against Constitutional Tampering" or "FACT" was formed to oppose the proposed amendment. *See Ex-Justice Karl to Head Drive for Lawsuit Amendment*, OCALA STAR-BANNER, Sept. 20 1984, at 5B. In 1988 the FMA collaborated with a coalition of businesses and other groups called the "Florida Committee for Liability Reform." *See* Alex Beasley, *Attorneys Fight Plan to Limit Liability Suits*, ORLANDO SENTINEL, Sept. 15, 1988, http://articles.orlandosentinel.com/19880915/news/0070040289_1_liability-florida-alert. In turn, AFTL created ALERT 88. Steve Masterson, then the Executive Director of AFTL, also served as the ALERT 88 chairman and general counsel. *See* Joe Bizzaro, *Alert '88 defends its ads attacking Amendment 10*, FLA. BAR NEWS, Oct. 15, 1988, *available at* legacy.library.ucsf.edu/documentStore/c/c/r/ccr47b00/Sccr47b00.pdf; Barbara J. Durkin, *Seminars Prep Doctors for Voter Campaign*, SUN SENTINEL (Fla.), Sept. 11, 1988, http://articles.sun-sentinel.com/1988-0911/news/8802220274_1_doctors-steve-masterson-florida-trial-lawyers; Jim Talley, *Malpractice Principals Protecting Their Assets*, SUN SENTINEL (Fla.), July 19, 1987, http://articles.sun-sentinel.com/1987-07-19/business/8703010156_1_malpractice-insurance-medical-malpractice-malpractice-victims. As discussed later in this Article, AFTL has also formed the political action committees "Alert 2002" and "Floridians for Patient Protection." The FMA created "Citizens for a Fair Share." *Sunshine, Ballots, and Lawyers*, CENTER FOR INDIVIDUAL FREEDOM (Feb. 12, 2004), http://www.cfif.org/htdocs/legislative_issues/federal_issues/hot_issues_in_congress/legal_reform/fma.htm.

9. In 1975, The Florida Legislature assembled a legislative task force that assembled and forwarded recommendations that led to the passage of the Comprehensive Medical Malpractice Reform Act provided in FLA. STAT. § 769.133 (1975) *See* Jessica Fonseca-Nader, Note and Comment, 8 ST. THOMAS L. REV. 551, 553–54 (1996). In 1984, Governor Bob Graham created a task force on medical malpractice which led to the passage of the Comprehensive Medical Malpractice Reform Act of 1985. GOV.'S T.F. ON MED. MALPRACTICE, REPORTS AND RECOMMENDATIONS, TOWARD PREVENTION AND EARLY RESOLUTION 17 (Apr. 1985); H.R. 1352 (Fla. 1985). A third task force was established under the Tort Reform and Insurance Act of 1986. Smith v. Dep't of Ins., 507 So. 2d 1080, 1083, 1086 (Fla. 1987). In 2002, Governor Jeb Bush assembled the "Governor's Select Task Force on Healthcare Professional Liability Insurance" discussed later in this Article. FLA. S. COMM. ON HEALTH REG., INTERIM PROJECT REPORT 2008-136: FLORIDA PATIENT SAFETY CORPORATION 1–2 (2007), *available at* http://archive.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-136hr.pdf.

10. *See* Aldana v. Holub, 381 So. 2d 231, 238 (Fla. 1980) (striking down the provision in Fla. Stat. § 768.44 requiring a claimant to submit any action before a mediation panel before filing lawsuit as violative of the Due Process Clause of U.S. Constitution and the Florida Constitution);

perpetuated this feud, and it shows no signs of relenting, as evidenced by reactions to the Florida Supreme Court's 2014 opinion in *McCall v. United States*[11] striking the statutory cap on wrongful death noneconomic damages in medical negligence cases enacted by the Florida legislature in 2003 that precipitated the advent of Amendment 7.[12]

At its core, the feud is about liability insurance premiums. Physicians blame trial lawyers for Florida's exorbitant medical malpractice premiums, and lawyers blame the high premiums on the insurance industry's business cycle fluctuations.[13] From the physician perspective, the holy grail of the medical malpractice tort reform feud has been establishing caps on non-economic damages. Seeking to emulate the success of California's Medical Injury Compensation Reform Act (MICRA)[14] in limiting liability insurance premium increases by capping non-economic damages, Florida physicians have repeatedly lobbied the

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Smith, 507 So. 2d at 1088, 1095 (Fla. 1987) (finding that the non-economic damage caps in the Tort Reform and Insurance Act of 1986 of $450,000 unconstitutionally denied claimants access to the courts under Article I, Section 21 of the Florida Constitution). The Court found that no reasonable alternative remedy or commensurate benefit was offered by the statutory caps and that there had not been a showing by the legislature that the caps were a result of "an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." *Id.* at 1089. In its opinion, the Court stated that Florida's Constitution would need to be amended to allow for such caps to remain. *Id.* at 1099 (Ehrlich, J., concurring in part, dissenting in part.).

11. In March 2014, the Florida Supreme Court ruled that statutory caps enacted in 2003 on non-economic damages violated the equal protection provision of the Florida Constitution in wrongful death cases. *See* Estate of McCall v. United States, 134 So. 3d 894, 916 (Fla. 2014). The Court rejected the statistical evidence of a medical malpractice insurance "crisis" and purported effect on health care availability relied upon by the Florida legislature in 2003. *Id.* at 906–07.

12. *Id.*

13. *See* FLA. H.R., SELECT COMM. ON MED. LIAB. INS. REP. 14 (2003).

> The causes of past and current insurance crises are hotly debated. However, they generally fall into two categories. One suggested cause is underwriting loss due to increases in the frequency (number) of claims, increases in the severity (size) of claims, and uncertainty due to the "long tail" (claims against a single year's policy are not all made and paid until a certain number of years later). The other suggested cause for the crises is investment loss due to a reduced rate of return on insurance company investment of premiums due to lower interest rates and the declining stock market.

Id.

14. California's Medical Injury Compensation Reform Act of 1975 (MICRA), 1975 Cal. Stat. 3949, is thought to have been a key influence on liability reform advocates during this period. *See* Leonard J. Nelson III et al., *Damages Caps in Medical Malpractice Cases*, 85 MILBANK Q., 259, 262–63 (2007). California caps noneconomic damages at $250,000 in malpractice cases with no upward adjustment for inflation. *Id.* at 262. MICRA also provides offsets for collateral sources of moneys received by the plaintiff such as health or disability insurance, periodic payouts of future damages and places contingency fee limits on plaintiff attorneys. *Id.* at 263.

Florida legislature for California-style caps.[15] When legislative efforts have either failed or were found to be unconstitutional by the Florida Supreme Court, physicians have carried the feud to Florida's State Constitution. Unlike other states that allow citizens to have a direct voice in lawmaking by voting for initiatives that, essentially, create a statutory law with the same force and effect of a bill passed by the state legislature, Florida allows its state constitution to be directly amended by voters. Similar to the U.S. Constitution, each State's Constitution is the supreme law of the land, and no Florida statutory law can be enacted that contravenes the provisions of Florida's State Constitution.[16] Twice during the 1980s, physicians in Florida sought to have the Florida State Constitution amended to require limits on malpractice awards.[17] Each of these efforts was vehemently fought by Florida trial lawyers.[18] The first effort in 1984 failed to make the ballot.[19] The second attempt made the ballot in 1988, but it did not pass.[20]

A decade passed before any further energy was placed into reform efforts.[21] Malpractice insurance rates decreased, and the overall number of lawsuits was down, as was the number of paid claims against physicians and the average awards collected by plaintiffs against

15. *See* GOV.'S T.F. ON MED. MALPRACTICE, *supra* note 9, at 21–22. *See also* Fonseca-Nader, *supra* note 9, at 553.

16. *See* FLA. CONST. art. XI, § 1. S*ee also* Mary Coombs, *How Not to Do Medical Malpractice Reform: A Florida Case Study*, 18 HEALTH MATRIX 373, 378–80 (2008) (analyzing Florida's unique ballot initiative process).

17. *See* GOV.'S T.F. ON MED. MALPRACTICE, *supra* note 9, at 21–22.

18. Alex Beasley & Rosemary Goudreau, *Interest Groups Stake Their Claims in Costly Political Wars*, ORLANDO SENTINEL, Apr. 13, 1986, http://articles.orlandosentinel.com/1986-0413/news/0210320017_1_malpractice-law-malpractice-suits-doctors-and-lawyers; Donna O'Neal, *Amendment 10 Foes Try Shock Treatment*, ORLANDO SENTINEL, Sept. 22, 1988, http://articles.orlandosentinel.com/1988-09-22/news/0070130004_1_florida-medical-malpractice-amendment-10.

19. *See* GOV.'S T.F. ON MED. MALPRACTICE, *supra* note 9, at 21. The Florida Supreme Court found that the proposed amendment violated the single subject rule by including language that eliminated the joint and several liability law then in place and by making changes to the summary judgment process. *Evans*, 457 So. 2d at 1354. The language of Amendment 9 was also found to misleading and defective and therefore did not appear on the ballot. *Id.* at 1355. Joint and several liability was eventually repealed by the Florida Legislature. *See* FLA. STAT. § 768.81 (2011).

20. Diane Hirth, *Measure Prompts Confusion Doctors, Victims Join Amendment 10 Debate*, SUN SENTINEL (Fla.), Oct. 30, 1988, *available at* http://articles.sun-sentinel.com/1988-10-30/news/8803030868 _1_florida-doctors-insurance-costs-medical-malpractice-cases; *Florida Civil Action Damages Limitations, Amendment 10 (1988)*, BALLOTPEDIA, http://ballotpedia.org/Florida_Civil_Action_Damages_Limitations,_Amendment_10_(1988) (last visited May 13, 2014).

21. JOHN C. HITT, GOV.'S T.F. ON HEALTHCARE PROF'L LIAB. INS. 54 (2003), *available at* http://floridahealthinfo.hsc.usf.edu/GovTaskForceInsReform.pdf.

physicians.[22] However, during the late 1990s and early 2000s, the malpractice climate started to change. Premium rates began to rapidly increase. For example, the U.S. General Accounting Office found that between 1999 and 2002, Ob/Gyn physicians practicing in Miami-Dade County saw their malpractice premiums increase by 43%, general surgery by 75%, and internal medicine by 98%.[23] For three years in a row, the American Medical Association cited Florida as a crisis state with respect to the effects medical malpractice jury awards and medical liability insurance premiums were having on the practice of medicine.[24] The Insurance Information Institute published a report that Florida doctors were sued twice as often as their peers in other states.[25] From 2000 to 2002, median medical malpractice insurance premiums for Florida providers increased 50.7% compared to a national median increase of 29.1%.[26] A report commissioned by the Florida Hospital Association concluded that the total amount of medical malpractice claims paid in 2000 was 150% higher than in 1991.[27] Total indemnity payments in the state of Florida for professional liability in 1975 were $10.2 million.[28] By 2001, the total had swollen to $326 million, an increase of a whopping 3074%.[29] A later detailed analysis of claims and litigation data during 2002 and 2003 indicated that the average yearly payout for closed claims in Florida increased regardless of the severity of the alleged injury.[30] The average of paid claims adjusted to the Consumer Inflation Index rose from $176,603 in 1990 to $300,280 in 2003.[31] The feud was soon back on, full strength.

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22. Diane Hirth, *Malpractice Crisis Eases Across State*, SUN SENTINEL (Fla.), Oct. 30, 1989, http://articles.sun-sentinel.com/1989-10-30/news/8902070108_1_medical-malpractice-malpractice-insurance-malpractice-lawsuits; Robert Pear, *Insurers Reducing Malpractice Fees for Doctors in U.S.*, N.Y. TIMES, Sept. 23, 1990, http://www.nytimes.com/1990/09/23/us/insurers-reducing-malpractice-fees-for-doctors-in-us.html.

23. *Excerpts from Medical Malpractice and Access to Health Care (GAO-03-836)*, ALMANAC OF POL'Y ISSUES, http://www.policyalmanac.org/health/archive/medical_malpractice.shtml (last updated Aug. 2003).

24. *See* HITT, *supra* note 21, at 3, 60.

25. *See* Robert P. Hartwig & Claire Wilkinson, *Medical Malpractice Insurance*, INS. ISSUES 1, 3 (2003).

26. David Dranove & Anne Gron, *Effects of the Malpractice Crisis on Access to and Incidence of High-Risk Procedures: Evidence from Florida*, 24 HEALTH AFF. 809 n.6 (2005).

27. FLORIDA HOSPITAL ASSOCIATION & MILLIMAN, USA, INC., MEDICAL MALPRACTICE ANALYSIS 4 (2002).

28. Robert E. Cline & Carl J. Pepine, *Medical Malpractice Crisis: Florida's Recent Experience*, 109 CIRCULATION 2936, 2936 (2004), *available at* http://circ.ahajournals.org/content/109/24/2936.

29. *Id.*

30. Neil Vidmar et al., *Uncovering the "Invisible" Profile of Medical Malpractice Litigation: Insights from Florida*, 54 DEPAUL L. REV. 315, 355 (2005).

31. *Id.* at 342.

In response to the hue and cry of the medical establishment, Governor Jeb Bush created, in August 2002, the "Governor's Select Task Force on Healthcare Professional Liability Insurance"[32] with the ultimate goal of "protecting Floridians' access to high-quality and affordable healthcare."[33] The 2002 Task Force was the Governor's third task force and the fourth overall governmental task force brought together to deal with Florida's continually defective medical malpractice environment since 1974.[34] The Task Force was made up of presidents and trustees of Florida universities, including Donna Shalala, President of the University of Miami and eight-year U.S. Secretary of Health and Human Services.[35] In its 379-page January 2003 main report and thirteen volumes of meeting transcripts, the 2002 Task Force satirically commented that it was "déjà vu all over again," and that the problem they were asked to confront had only compounded.[36] In fact, the 2002 Task Force bitingly stated that all of Florida's previous efforts to eliminate the state's medical malpractice crisis had been unsuccessful:[37]

> Since 1975, Florida has implemented (or attempted to implement) numerous alternatives to the cap on non-economic damages and the other reforms recommended in this Report. None, alone or together with the others, has solved the crisis of medical malpractice insurance availability and affordability. Instead, Florida's numerous attempts to solve this problem are nothing more than a failed litany of alternatives.[38]

The Task Force detailed the elements that led to the crisis: medical malpractice awards were increasing to record levels, claim frequency was increasing, medical malpractice insurance premiums continued to rise and were becoming unaffordable, many insurers and re-insurers had left the medical malpractice insurance market, and coverage was on the verge of becoming so unavailable at any price that some physicians and hospitals were reducing the limits of their malpractice coverage or foregoing insurance entirely.[39] The Task Force stated that "Florida healthcare providers fear a bleak picture for Florida, but the Task Force believes it could get worse in the coming years if no corrective action is taken."[40]

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32. HITT, *supra* note 21, at 2.
33. *Id.*
34. *See id.* at 4.
35. *Id.* at 3.
36. *Id.* at 4.
37. *Id.* at 220.
38. *Id.* at 219.
39. *See id.* at 212.
40. *Id.* at 211.

In total, the Task Force made sixty recommendations in five areas of reform: (1) health care quality, (2) physician discipline, (3) tort compensation, (4) alternative dispute resolution, and (5) insurance code reform.[41] Despite this breath of suggested remedies, the 2002 Task Force made it very clear what they believed would be the only way Florida could finally resolve the issue:

> The Task Force is of the opinion that, while these comprehensive reforms are important, the centerpiece and the recommendation that will have the greatest long-term impact on healthcare provider liability insurance rates, and thus eliminate the crisis of availability and affordability of health care in Florida, is a $250,000 cap on non-economic damages.[42]
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> > [T]he Task Force finds and concludes that, without the inclusion of a cap on potential awards of non-economic damages in the package, no legislative reform plan can be successful in achieving a goal of controlling increases in healthcare costs, and thereby promoting improved access to healthcare.[43]

In reaching this conclusion, the 2002 Task Force relied heavily on the experience of California with its MRICA statutory caps and the findings of the U.S. Department of Health and Human Services, the Congressional Budget Office, and the Government Accounting Office.[44] The major argument against the imposition of caps on non-economic damages used by the Florida Supreme Court when it struck the cap provisions in the Tort Reform and Insurance Act of 1986 was also addressed by the Task Force, namely that caps limit the constitutional right of access to courts.[45] The Task Force stated there was an overwhelming public necessity for caps on awards of non-economic damages and that no alternative or less onerous method for meeting the public necessity could be shown or would be successful as required by the two prong test established by the Florida Supreme Court in *Kluger v. White*.[46]

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41. *Id.* at 336–45.

42. *Id.* at xvii.

43. *Id.* at 218.

44. "The Task Force finds that California has succeeded where Florida has failed at holding down medical malpractice insurance premium rates." *Id.* at 193.

45. FLA. STAT. § 768 (1985).

46. 281 So. 2d 1, 4 (Fla. 1973). In *Kluger*, the Court held that

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of

II. FLORIDIANS FOR PATIENT PROTECTION

Sensing that they were in for an all-engaging battle, Florida's plaintiff trial lawyers drew upon valuable lessons that their California colleagues had learned in the rough-and-tumble arena of California ballot initiative politics; namely, that polling data indicated voters were not interested in supporting ballot initiatives directly sponsored by trial lawyers.[47] As a result of this undeniable revelation, the California Trial Lawyers Association began in the late 1980s to disguise their initiative campaigns as originating from grassroots consumer groups.[48] AFTL became keen students of this masking technique, and by the late 1990s were considered masters of Astroturfing.[49]

Their masterpiece of Astroturf management was the creation of "Floridians for Patient Protection."[50] In July of 2002, ATFL Executive Director Scott Carruthers filed documents with the State of Florida to change the name of one of ATFL's existing political action committees from "Alert 2002" to "Floridians for Patient Protection (FPP)."[51] ATFL and FPP shared the same Tallahassee office address.[52] Carruthers was listed as the chairman of FPP.[53] The 2001-02 AFTL President, Mark W. Clark, and the 2002-03 President–elect, Howard Coker, were listed as board members.[54] Huge amounts money started flowing into FPP from Florida's trial lawyers.[55]

> the common law of the State pursuant to Fla. Stat. s 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Id. See also Univ. of Miami v. Echarte, 618 So. 2d 189, 197–98 (Fla. 1993) (holding two statutes with caps on non-economic damages in medical malpractice cases when the parties entered binding arbitration were constitutional under the *Kluger* test).

47. Kenneth Reich, *Insurers Demand Lawyers be Named in Initiative Ads*, L.A. TIMES, June 29, 1988, *available at* http://articles.latimes.com/1988-06-29/news/mn-5023_1_trial-lawyers.

48. *Id.*

49. John Kennedy, *Need a Grass-roots Campaign? Industries Learn How to Hire One*, SUN SENTINEL (Fla.), Oct. 28, 1996, *available at* http://articles.sun-sentinel.com/1996-10-28/business/9610280244_1_legislators-astroturfing-lobbyists.

50. *Id.*

51. *Id.*

52. Statement of Organization of Political Committee, Alert 2002, Inc. (Apr. 29, 2002) (on file with author).

53. *Id.*

54. *Id.*

55. *See Floridians for Patient Protection*, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, Top Industries, http://www.followthemoney.org/entity-details?eid=10239219 (last

The next maneuver was to recruit a former client to nominally head FPP, and Jacqueline Imberston was selected for this role. Palm Beach-based ATFL member Ted Babbitt and his firm, Babbitt, Johnson, Osborne & Le Clainche, represented Imbertson and her husband Edward in a malpractice action against Palm Beach Gardens Community Hospital, Inc. filed in 2000. During 2002, while the Governor's Select Task Force on Healthcare Professional Liability Insurance was conducting its malpractice analysis and physicians groups were holding rallies to promote a non-economic damages cap, Imbertson began appearing at FPP organized counter-rallies claiming to be the co-founder of FPP. The Governor's Task Force even included Imbertson's testimony as representing FPP in its report.[56]

During the summer of 2003, as the battles began heating up over medical malpractice reform, Imbertson was still holding herself out to the press as the founder of FPP, which she claimed was a grass-roots organization made up of injured patients and their families who wanted to improve patient safety.[57] At this same time, FPP was running costly state-wide television ads opposing tort reform proposals being considered by the Florida Legislature.[58] During a July 2003 press conference to announce the running of the ads, Imbertson was confronted about who was paying for the television time and how FPP was funded.[59] Imbertson's response was unequivocal: "The group is supported by private individuals and does not receive money from trial lawyers."[60] She further said she did not know who had funded the airtime, and that FPP did not disclose its donors.[61] The next day, after the news media and the FMA challenged Imbertson's claims, both Imbertson and AFTL were required to admit that the ads and Floridians for Patient Protection were in fact funded by trial lawyers.[62]

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visited Sept. 25, 2014).

56. *See* HITT, *supra* note 21, at 159.

57. Nancy McVicar & Ana M. ValdM-is, *Hospitals Seek Rx for Drug Mistakes Bar-coding, Computers, Help Cut Errors*, SUN SENTINEL (Fla.), July 7, 2003, *available at* http://articles.sun-sentinel.com/2003-07-07/news/0307070161_1_patient-safety-nurses-miami-children-s-hospital.

58. *See* John Snow, *Patient Advocate Group Admits Ties to Lawyers*, JACKSONVILLE BUS. J., July 3, 2003, *available at* http://www.bizjournals.com/jacksonville/stories/2003/06/30/daily 22.html?page=all.

59. *See id.*

60. *Id.*

61. *See id.*

62. *See* Allison North Jones, *Lawyers Admit to Bankrolling Malpractice Ad*, TAMPA TRIB., July 3, 2003. This was not the first time AFTL had been caught clandestinely using "victims" of medical malpractice to lobby against tort reform. In 1985, AFTL's executive director, Stephen Masterson, initially denied and later admitted AFTL had funded lobbying trips to Tallahassee by members of Florida Victims of Medical Malpractice, Inc. *See* Maya Bell, *Lawyers Group Pays Bills of Malpractice Lobbyists*, ORLANDO SENTINEL, Apr. 28, 1985, *available at* http://articles. orlandosentinel.com/1985-04-28/news/0290270259_1_academy-masterson-medical-

After Governor Jeb Bush called four separate special sessions to work on medical malpractice reforms, the Florida Legislature passed Senate Bill 2-D on September 15, 2003.[63] Despite the lobbying efforts of the Florida Medical Association, the Florida Hospital Association (FHA), the Florida Osteopathic Medical Association, insurance carriers, and the Florida Chamber of Commerce,[64] the legislature rejected a hard $250,000 cap proposed by the Task Force and instead ultimately adopted a system of six progressive, variable caps of between $150,000 and $1.5 million depending upon the type of defendant, setting, and injuries involved.[65] Leadership within the FMA felt that some republicans in the Florida Senate had been under the heavy influence of the trial lawyers.[66] During the full Senate's debate on the bill, the Chairman of the Judiciary Committee, Alex Vilalobos (R)[67] stated that, based upon testimony

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malpractice. As late as 2011, FPP was still representing itself as a legitimate grassroots organization, as evidenced by the *"Identites of Amici Curiae and Statements of Interest"* in an Amici Curiae brief filed in support of Appellants seeking to overturn the statutory caps on damages in wrongful death actions. Brief of Floridians for Patient Protection, Inc. & Florida Consumer Action Network, Inc. as Amici Curiae Supporting Appellants, McCall v. United States, 134 So. 3d 894 (2014) (No. SC11-1148).

> Floridians for Patient Protection, Inc. ("FPP") is a proactive organization of medical malpractice and negligence victims and their families striving for justice and change in Florida's medical care system and seeks to educate the public and increase awareness regarding medical errors and the urgent need for reforms in quality of care for all citizens.

Id. at *iv.

63. Leg. Ch. 2003-416, 18th Leg., Spec. Sess. D (Fla. 2003).

64. The FMA and the FHA formed the Coalition to Heal Healthcare in Florida, which successfully lobbied the Florida House of Representatives to include a $250,000 cap on non-economic damages and most of the sixty recommendations of the Task Force. *See* Robert E. Cline & Carl J. Pepine, *Medical Malpractice Crisis: Florida's Recent Experience*, 109 CIRCULATION 2936, 2937 (2004).

65. *See id.*

66. *See* Coombs, *supra* note 16, at 381–82.

67. In his 2002 Senate campaign, Villalobos received over $26,000 in contributions from lawyers and lobbyists (which included AFTL), by far his largest group of contributors. *See Showing Contributions to Villalobos, J Alex*, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, http://www.followthemoney.org/show-me?c-t-eid=12999047&c-t-id=81780#[{1|gro=d-cci (last visited Sept. 26, 2014). Trial lawyers were given credit for assisting Villalobos in getting re-elected in his tight Senate campaign race in 2006. *See* Aaron Deslatte, *Analysis: Why -- and How -- the Ball on Central Florida's Commuter-rail Project was Dropped*, ORLANDO SENTINEL, May 4, 2008, *available at* http://articles.orlandosentinel.com/2008-05-04/news/a1commuter04_1_commuter-rail-commuter-rail-csx-corp; Aaron Deslatte, *Cash & Threats: How Trial Lawyers Wielded New Power to Help Block Commuter Rail*, ORLANDO SENTINEL, May 20, 2008, *available at* http://articles.orlandosentinel.com/2008-05-20/news/csx20_1_trial-lawyers-commuter-rail-legislators. In 2010, Villalobos was the recipient of the Perry Nichols Award, "the highest honor bestowed" by the Academy of Florida Trial Lawyers. *J. Alex Villalobos*, MEYER, BROOKS, DEMMA AND BLOHM, P.A., http://www.meyerandbrooks.com/JAV.htm (last visited May 14, 2014).

before the Judiciary Committee, there had been no evidence of a crisis, no evidence of significant increases in malpractice lawsuits, no evidence of significant increases in malpractice claims payouts, and no testimony that the only way to reduce malpractice premiums was to cap non-economic damages.[68]

III. A PATIENT'S RIGHT TO KNOW

The leadership of the FMA was particularly incensed by AFTL's powerful and decisive influence during the Senate Bill 2-D battle[69] and therefore withdrew its support of Senate Bill 2-D, primarily based on the lack of a hard $250,000 cap.[70] Two weeks after Senate Bill 2-D was signed by Governor Bush, the FMA decided at their annual meeting to pursue, for the third time in twenty years, yet another constitutional amendment to rectify perceived disparities in the Florida medical malpractice system.[71] However, instead of seeking to directly cap damages as it had in the past, the physicians' initiative would take what they thought would be a more palatable approach with voters and sought to place restrictions on the contingency fees attorneys could collect in medical malpractice actions.[72] Under what would become known as Amendment 3, patients would receive 70% of the first $250,000 in all damages awarded and 90% of any award above $250,000.[73]

AFTL members were immediately prepared to fight Amendment 3 with a pre-designed game plan based upon their experiences fighting the FMA in the 1980s[74] and borrowing another page from the California trial bar's playbook.[75] For many years, California trial lawyers used the state's ballot initiative system to place "counter" propositions in front of voters in order to defeat or annul what they perceived as "anti-lawyer" or tort reform initiatives.[76] Adapting this California concept for their situation in

68. S. JOURNAL NO. 2, 18th Leg., Spec. Sess. D, at 25 (Fla. 2003).

69. *See* Coombs, *supra* note 16, at 381–82.

70. *See* Cathy Tokarski, *Malpractice Reform Signed into Law in Florida: A Newsmaker Interview with Robert Cline, MD*, MEDSCAPE (Sept. 5, 2003), http://www.medscape.com/view article/461009.

71. Coralie Carlson, *Doctors to Seek Awards Revision*, LEDGER (Aug. 31, 2003, 2:24 AM), http://www.theledger.com/article/20030831/NEWS/308310435.

72. *See* Coombs, *supra* note 16, at 382–83.

73. *See The Medical Liability Claimant's Compensation Amendment 03-34*, FLORIDA DIVISION OF ELECTIONS http://election.dos.state.fl.us/initiatives/initdetail.asp?account=37767 &seqnum=1 (last visited Sept. 27, 2014).

74. *Id.*

75. Mike Thomas, *Doctors and Lawyers Should Call off the Dogs*, ORLANDO SENTINEL Apr. 1, 2004, *available at* http://articles.orlandosentinel.com/2004-04-01/news/0404010124_1_ lawyers-doctors-and-hospitals-florida-medical.

76. *See* Coombs, *supra* note 16, at 383 n.43. *See also* Dan Morain, *Initiative Would*

Florida, AFTL leaders carefully fashioned a set of retaliatory initiatives to use as threats against the FMA and other groups traditionally aligned with the FMA that might have been seeking to upset the Florida malpractice status quo.[77]

Initially, AFTL planned four distinct retaliatory initiatives with FPP as their Astroturf sponsor: "Requiring New Standards for Insurance Rating," "Physicians Shall Charge the Same Fee for the Same Health Care Service to Every Patient," "Prohibition of Medical License After Repeated Medical Malpractice," and "Patients' Right to Know About Adverse Medical Incidents."[78] It is important to note that neither AFTL, FPP, nor any other group for that matter, had any actual political interest in pursuing any of the proposed retaliatory amendments. At the time, AFTL freely admitted the proposed amendments were simply being used as threats to intimidate FMA and its allies into capitulation by withdrawing Amendment 3. AFTL's professional leadership described their tactics as "a policy similar to the mutual assured destruction policy."[79] AFTL's Scott Carruthers[80] stated to the news media that the lawyers felt compelled to retaliate after the FMA filed their attorney's fee limiting amendment.[81]

Subsequent to crafting the retaliatory initiatives, AFTL began applying pressure to keep the physicians' amendment off the November 2004 ballot. County and specialty medical societies were approached by the trial lawyers to cajole them into breaking ranks with the FMA.[82] The influential Associated Industries of Florida, the Florida Hospital Association, the Florida Insurance Council, the Florida Chamber of Commerce, and the Florida Association of Health Plans, all previous supporters of the FMA's efforts, were confronted by AFTL and subsequently either opposed Amendment 3 or declined to support it.[83]

Associated Industries of Florida (AIF) and the Florida Insurance

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Guarantee Lawyers Could Set Own Fees, L.A. TIMES, Sept. 24, 1996, *available at* http://articles.latimes.com/1996-09-24/news/mn-47040_1_trial-lawyers; Kenneth Reich, *Lawyers Urged to Halt Ads Until After Election*, L.A. TIMES, Oct. 15, 1988, *available at* http://articles.latimes.com/1988-10-15/news/mn-3370_1_trial-lawyers.

77. *See generally* Coombs, *supra* note 16, at 383–84.

78. *See* DIVISION OF ELECTIONS, *supra* note 7.

79. *Id.* at 383.

80. Carruthers, who was with AFTL for over twenty years, was suspended, and then later resigned in 2009 amid an internal investigation concerning a race-baiting campaign mailer issued by the trial lawyers' group. Dara Kam, *Trial Lawyers' Executive Director Scott Carruthers Quits over Racial Mailer*, PALM BCH. POST (Oct. 27, 2009), http://postonpolitics.blog.palmbeachpost.com/2009/10/27/trial-lawyers-executive-director-scott-carruthers-quits-over-racial-mailer/.

81. *Power Plays Unwelcome*, SUN SENTINEL (Fla.) (Dec. 28, 2003), http://articles.sun-sentinel.com/2003-12-28/news/0312241191_1_florida-trial-lawyers-medical-malpractice-doctors.

82. *See* Coombs, *supra* note 16, at 384.

83. *Id.*

Council (FIC) took active steps to persuade Florida's physicians not to support the FMA amendment. The AIF sent a letter to over 40,000 doctors outlining its opposition to the amendment.[84] FIC's president stated that the Florida Constitution needed to be protected from "groups seeking to sidestep the 'checks and balances' found in the legislative process."[85] To reward the defection of the other stakeholders, AFTL withdrew the "Requiring New Standards for Insurance Rating" and the "Physicians Shall Charge the Same Fee for the Same Health Care Service to Every Patient" amendments, arguably the two with the greatest impact on the business and insurance communities.[86] Interestingly, just six months prior, the FIC had openly questioned the efficacy of Senate Bill 2-D by stating, "the Council is concerned that the insurance industry, the healthcare community, and the consumer will not see significant relief from this compromise while the trial lawyers continue their hold on the system."[87] While AFTL's efforts were partially successful, the FMA refused to negotiate with the trial lawyers whom they viewed as "terrorists,"[88] and repeatedly rejected AFTL's demands that the FMA drop Amendment 3 in exchange for AFTL dropping their anti-doctor amendments.[89] As a result, Amendments 3, 7, and 8 remained.

Both the FMA and AFTL were respectively able to gather a sufficient number of voter signatures and all three initiatives were vetted and approved by the Florida Supreme Court.[90] The game of wooing Florida voters remained. Among the three initiatives, Amendment 7 was particularly beguiling to an unwitting Florida voter. The ballot title and summary read:

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84. *See* Sample Letter from Jon L. Shebel, President & Chief Executive Officer, Associated Industries of Florida Service Corporation, to Doctor (Jan. 30, 2004), *available at* http://aif.com/information/2004/extra/dr_letter.pdf..

85. *Id.*

86. *See* Coombs, *supra* note 16, at 384 nn.45–46.

87. *Florida Insurance Council Statement on Medical Malpractice Agreement*, ASSOCIATED INDUSTRIES OF FLORIDA (Aug. 8, 2003), http://aif.com/information/2003/sn030808c.html.Florida Professional Insurance Corporation's CEO Bob White and FIC lobbyist Mark Delegal during interviews conducted a few years later called the proposed AFTL amendments "'blackmail'" and "'bullets and guns pointed at our heads.'" *See* Coombs, *supra* note 16, at 384 n.50.

88. *See* Coombs, *supra* note 16, at 385 n.51. *See also* Mike Thomas, *3 Strikes for MDs? Patients Will Be Losers*, ORLANDO SENTINEL, June 6, 2004, *available at* http://articles.orlandosentinel.com/2004-06-06/news/0406060126_1_pacemakers-florida-medical-trial-lawyers.

89. *See* Thomas, *supra* note 75. *See also AFTL Files Three Proposed Constitutional Amendments*, FLA. BAR (June 1, 2004), http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/e77915b842abcdea85256ea000538bc2!OpenDocument.

90. *See generally* Advisory Opinion to the Atty. Gen. (*In re* Med. Liab. Claimant's Comp. Amendment), 880 So. 2d 675, 679 (Fla. July 15, 2004); Advisory Opinion to the Atty. Gen. (*In re* Patients' Right to Know About Adverse Med. Incidents), 880 So. 2d 617, 623 (Fla. 2004); Advisory Opinion to the Atty. Gen. (*In re* Pub. Prot. from Repeated Med. Malpractice), 880 So. 2d 667, 673 (Fla. 2004).

> "Patients' Right to Know About Adverse Medical Incidents." Current Florida law restricts information available to patients related to investigations of adverse medical incidents, such as medical malpractice. This amendment would give patients the right to review, upon request, records of health care facilities' or providers' adverse medical incidents, including those which could cause injury or death. Provides that patients' identities should not be disclosed.[91]

Positive polling numbers prior to the November election proved that Amendment 7 used language that basically sold itself to the average Florida voter.[92] The voting public was being offered a "right to know" about something that heretofore had been withheld, and it was something, based upon the language used, that could literally kill you. Never mind that there is no explanation in the ballot summary as to why the Florida Legislature had "restricted" disclosure of information related to adverse medical incidents for the thirty years prior this initiative.[93] Never mind that no one had ever actually sought to directly repeal any of the collection of statutes that make up Florida's health care self-regulation protections.[94] Never mind that Florida courts had consistently upheld these privileges and placed high social value on the need to maintain the protections.[95] Amendment 7 was worded in such a way that anyone could see himself or a loved one as a patient. It was ostensibly granting a right of knowledge and protection for free.

Unfortunately, it did not require the voter to consider the negative consequences of its passage, which would have been much more difficult to articulate.[96] Florida's news media, which had been chronicling the battle between the physicians and trial lawyers, saw the purpose of all three amendments as not to benefit Floridians, but rather to harm the interest of a single opposing interest group.[97] In light of this estimation,

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91. FLORIDA DIVISION OF ELECTIONS, *Patients' Right to Know About Adverse Medical Events Ballot* 1, *available at* http://election.dos.state.fl.us/initiatives/fulltext/pdf/35169-3.pdf (last visited Sept. 14, 2014) [hereinafter FLA. DIV. OF ELEC.].

92. *See* Coombs, *supra* note 16, at 386.

93. *See* FLA. STAT. § 769.133 (1975); *supra* note 11.

94. *See* FLA. DIV. OF ELEC., *supra* note 91.

95. James C. Sawran & Robert C. Weill, *Amendment 7: Will the Patients' Right-to-Know Come at Too High a Price?*, 24 TRIAL ADVOC. Q. 7, 10–12 (2005).

96. Opponents of Amendment 7 called it a "'wolf in sheep's clothing'" citing that its "innocent" title hid its real intent to open patient safety reviews and quality assurance efforts to trial lawyers for purposes of lawsuits. *See* Joseph D. Portoghese, *The Hidden Agenda of Amendment 7: Other Views – My Word*, ORLANDO SENTINEL, Oct. 19, 2004, *available at* http://articles.orlandosentinel.com/2004-10-19/news/0410190160_1_patient-care-medical-staff-amendment-7.

97. *See* Thomas, *supra* note 75.

Florida journalists overwhelmingly recommended that Floridians vote "no" on all three Amendments.[98]

Over $27.3 million in contributions were made to FPP to support its efforts in the 2004 election.[99] Almost all of it came from AFTL, Florida plaintiff malpractice lawyers, and their law firms.[100] By comparison, former Florida governor Charlie Crist only raised $24.2 million in his winning 2006 gubernatorial campaign.[101] Not surprisingly, On November 2, 2004, Florida voters passed all three amendments.[102] Amendment 7 received over 5.8 million votes in favor of its passage.[103]

IV. A CONSUMER PROTECTION AND INFORMATION TOOL?

Winston Churchill is often credited with the adage, "history is written by the victors."[104] Not surprisingly, some Florida plaintiffs' lawyers have lived up to base expectations and have employed self-serving revisionist histories surrounding the intent behind the passage of Amendment 7. They have promoted a characterization that prior to the passages of Amendment 7, Floridians collectively held a "long-simmering frustration over a perceived 'protect our own' mentality perpetuated by the medical profession's effort's to shield from public scrutiny even the most dangerous doctors and hospitals."[105]

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98. *See id.*; *Power Plays Unwelcome*, *supra* note 81; *Vote No on 3 Medical Issues*, SUN SENTINEL (Fla.), Oct. 24 2004, http://articles.sun-sentinel.com/2004-10-24/news/0410211157_1_malpractice-award-medical-malpractice-malpractice-reforms; Fuchsia, *Our Position: Only 2 of 8 Constitutional Amendments Deserve Voter Support*, ORLANDO SENTINEL, Oct. 17 2004, http://articles.orlandosentinel.com/2004-10-17/news/0410160036_1_constitutional-amendments-florida-constitution-florida-constitution.

99. FLA. DIV. OF ELEC., *Floridians for Patient Protection*, at 1, *available at* Campaign Finance Activity, http://election.dos.state.fl.us/cgi-bin/contrib.exe (last visited Sept. 19, 2014).

100. *See id.*

101. *Names in the News: Charlie Crist vs. Marco Rubio*, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, http://classic.followthemoney.org//press/ReportView.phtml?r=392&ext=1 (last visited Sept. 19, 2014).

102. Amendment 3 received 63.58% of votes cast, Amendment 7 received 81.16% and Amendment 8 received 71.081%. *See Florida 2004 Ballot Measures*, BALLOTPEDIA, http://ballotpedia.org/Florida_2004_ballot_measures (last visited Sep. 19, 2014).

103. *Id.*

104. Jill Wagner, *Finding a Roadmap to Teach Kids about Mideast Study Examines History Textbooks for Israelis, Palestinians*, NBC NEWS, Fri., May 6, 2005, *available at* http://www.msnbc.ms.com/id/7759863.

105. J.B. Harris, *Riding the Red Rocket: Amendment 7 and the End of Discovery Immunity of Adverse Medical Incidents in the State of Florida*, 83 FLA. B.J. 20, 20 (2009), *available at* http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/258fdd31c33e3cda85257567006b3148?OpenDocument. It is notable that while Mr. Harris' article provides ample citation to much what is asserted, his contention that Amendment 7's passage symbolized the public's long term dissatisfaction with peer review privileges carries no

But as has been attributed to four-term U.S. Senator Daniel Patrick Moynihan, "everyone is entitled to his own opinion, but not his own facts."[106] There is simply no citable evidence that prior to Amendment 7, Florida's peer review system was subject to any sort of reform effort lead by citizen groups. While a number of commenters legitimately criticize the efficacy of peer review (and in some cases severely),[107] authentic peer review critics have not been inclined to portray the passage of Amendment 7 in such simplistic and erroneous terms.[108] The tragedy of these distortions is that once they are printed, like a false rumor, they are perpetuated by others.

Take for example a 2013 law journal article that states: "Amendment 7's passage came to symbolize the public's long-standing frustration over a perceived 'protect our own' mentality that shielded from public scrutiny even the most dangerous doctors and hospitals."[109] This is almost a direct quote from the article cited in the previous paragraph, which was authored by a Florida trial lawyer post-passage of Amendment 7 that carries no citation.[110] Maybe credit should be given those plaintiff trial lawyers who have made token attempts at being intellectually honest with comments like "[The *Buster* 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."[111]

Perhaps the most ignoble and harmful byproduct of the makeover of AFTL's original retaliatory intent behind Amendment 7 has been a uniform presumption that it is utilized by patients to better determine from whom they should seek health care and evaluate the quality and fitness of health care providers currently rendering service to them.[112]

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citation. *Id*.

106. *Daniel Patrick Moynihan*, WIKIQUOTE, http://en.wikiquote.org/wiki/Daniel_Patrick_Moynihan (last updated May 3, 2014).

107. *See* Yann H.H. van Geertruyden, *The Fox Guarding the Henhouse: How the Health Care Quality Improvement Act of 1986 and State Peer Review Protections Statutes Have Helped Protect Bad Faith Peer Review in the Medical Community*, 18 J. CONTEMP. HEALTH L & POL'Y 239, 252–53 (2001). "While it is important to keep the peer review proceeding confidential in civil trials involving malpractice claims, physicians should have the right to inspect and offer evidence of bad faith discovered at the peer review proceedings." *Id.* at 268.

108. *See Statement of Joanne Doroshow Executive Dir., Ctr. for Justice & Democracy, before the Governor's Select Task Force on Healthcare Professional Liability Insurance*, (Oct. 21, 2002), *available at* centerjd.org/system/files/FloridaTestimony.pdf.

109. Brendan A. Sorg, *Is Meaningful Peer Review Headed Back to Florida?*, 46 AKRON L. REV. 799, 814 (2013).

110. *See* Harris, *supra* note 105, at 20.

111. Ted Babbitt, *Patient's Right to Know*, BABBITT, JOHNSON, OSBORNE, & LE CLAINCHE, P.A., *available at* http://www.babbitt-johnson.com/2009/January-2009.pdf.

112. *See* Robert C. Weill, *Buster and the Continuing Saga over the Patients' Right-to-Know-About-Medical-Incidents-Amendment*, 28 TRIAL ADVOC. Q. 14, 14 (2009).

Before it reached the ballot, Amendment 7 was craftily veiled as a consumer information tool.[113] During the Florida Supreme Court's advisory opinion review for single-subject, ballot title, and summary standards,[114] lawyers for Floridians for Patient Protection argue that, combined with the title, "Patients' Right to Know About Adverse Medical Incidents," Amendment 7's summary made it clear that the amendment was referring to "consumer information."[115] FFP representatives echoed this invented intent during the campaign, claiming that knowledge gained under Amendment 7 would be used to choose the best doctors and hospitals: "We can find out the reputation of our hair dressers or auto mechanics but not our doctors. It's ludicrous for something as important as your health care."[116] After the amendment's passage, the Florida Supreme Court unfortunately endorsed the consumer information tool pretense of the Amendment in its *Buster* decision:

> While we have differed in some respects with the opinion of the Fifth District in *Buster*, we cannot improve upon Judge Sawaya's concluding comments:
>
> > 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.[117]

Post-passage, this quote was seized upon and expanded by the plaintiff's bar. AFTL lawyers claimed that doctors were "hiding behind peer review to protect each other and that the public should have access to information about a hospital's track record with infection rates, adverse incidents, and other mistakes in order to make an informed decision about

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113. *Id.*

114. FLA. STAT. § 101.161(1) (2014); *see generally* FLA. CONST. art. II, § 3.

115. Mark D. Killian, *Academy, FMA Square off over Amendments*, FLA. B. NEWS, July 1, 2004, at 2; Laura V. Yaeger, *Amendment 7: Medical Tradition v. The Will of the People: Has Florida's Peer Review Privilege Vanished?*, 13 MICH. ST. U.J. MED. & L. 123, 127 (2009).

116. Cherie Black, *Patient Could Examine Docs*, FLA. TIMES-UNION, Oct. 29, 2004 (quoting Melinda Hause, a board member of FPP), http://jacksonville.com/tu-online/stories/102904/met_17046452.shtml.

117. Fla. Hosp. Waterman, Inc. v. Buster, 984 So. 2d 478, 494 (Fla. 2008) (quoting Fla. Hosp. Waterman, Inc. v. Buster, 932 So. 2d 344, 355–56 (Fla. 5th DCA 2006)).

where to seek medical care."[118] FPP/FTLA lawyers have continued to claim that Amendment 7 was designed to allow prospective patients to have "all the information available" about a physician's qualifications or competence before being treated.[119] Plaintiff's attorney Sean Domnick, who handled the *Buster* case for the plaintiffs at the trial level and argued the appeal before the Florida Supreme Court has been quoted as saying "people want to [have control] and they're entitled to have control over their own health care decision-making."[120] Furthermore, he stated "but you can't make a decision [about health care] if you don't have the information."[121] AFTL successor organization the Florida Justice Association president Frank Petosa, has said when discussing Amendment 7 that selecting a doctor can be a life-or-death decision, so patients should know if their physician has made past mistakes. "It should not be swept under the rug in a cloud of secrecy."[122]

V. DO PATIENTS KNOW (OR CARE) ABOUT "A PATIENT'S RIGHT TO KNOW"? A HOSPITAL RISK MANAGERS SURVEY

Although the plaintiffs' bar consistently cites to the number of Floridians who voted for Amendment 7 as proof of the Amendment's popularity, after leaving the voting booth, the general public quickly took no further notice of "a patient's right to know" as disputes over its scope and the subsequent implementing statute worked their way through the court system.[123] Reflecting the true intent of Amendment 7, it is illuminating to note that it contains no provision requiring notification to patients of the existence of their right to query about adverse incidents.[124] Unsurprisingly, there is no record of any of the parties involved in Amendment 7's passage taking up the cause of informing patients of their "right to know." It is well understood by those responsible for responding to Amendment 7 requests that the Amendment has not been used for

118. Liz Freeman, *Voters OK Trio of Medical Malpractice Amendments*, NAPLES NEWS, Nov. 10, 2004 (on file with author).

119. *See* Coombs, *supra* note 16, at 394–95, 419; Babbitt, *supra* note 111.

120. Stephan Stock, *I-Team: Ignoring Patients' Right to Know*, CBS4 Miami (May 23, 2011, 10:52AM) (quoting Sean Domnick, plaintiff's trial lawyer in the Buster case), http://miami.cbslocal.com/2011/05/23/i-team-ignoring-patients-right-to-know/.

121. *Id.*

122. Bill Kaczor, *Hospitals Lose Florida Court Fight Against Patients' Right To Know*, DAILY REP. (Mar. 7, 2008) (quoting Florida Justice Association President, Frank Betosa), http://www.dailyreportonline.com/id=1202552309564/Hospitals-lose-Florida-court-fight-against-patients'-right-to-know?slreturn=20140414141807#ixzz2zFULYKyj.

123. Liz Freeman, *Resolving 'Right to Know' Will Take Time*, NAPLES DAILY NEWS (July 3, 2006, 12:02AM), http://www.naplesnews.com/news/local-news/supreme_court_untangle_patients_right_know.

124. FLA. CONST. art. X, § 22.

anything other than a litigation tool.[125] However, there has been no data to authenticate this supposition or what the Amendment has cost in terms of time and legal expense. To better understand what is precipitating Amendment 7 requests, in July of 2013, as a part of this Article, we prepared and conducted a survey of licensed Florida risk managers of the 218 acute care hospitals in Florida.[126] Under Florida law, hospitals are required to maintain an internal risk management program that includes the retention of a licensed risk manager who is responsible for implementation and oversight of the facility's risk management program.[127] Our findings provided many insights into the consequences of Amendment 7 and speak to its lack of meaningful benefits and negative fallout.

A. *Population and Survey Sample*

An alphabetical listing of acute care hospitals was obtained from the Florida Agency for Health Care Administration (AHCA).[128] This list was cross-referenced with a list of licensed risk managers in the State of Florida from the Florida Society for Healthcare Risk Management and Patient Safety (FSHRMPS) to match which risk managers represented which acute care hospitals.[129] The Board of Directors of FSHRMPS was contacted about this survey and gave their support of the project.[130]

A total of 182 e-surveys were sent to hospital risk managers which enjoyed 45.6% response rate, encompassing a total of 83 facilities, or 38% of acute care facilities in Florida.[131] Our survey has a 95% level of certainty with a margin of error of +/- 7.96%. Twenty-seven Florida counties were represented in the sample population, and they were evenly distributed across all geographic regions across the state.[132]

B. *Survey Methodology and Approach*

Phone calls were made to each facility risk manager to confirm the correct individual was responding for the facility and to explain the

125. *See* Coombs, *supra* note 16, at 395; James C. Sawran & Robert C. Weill, *Amendment 7: Will the Patient's Right to Know Come at Too High a Price?*, 24 TRIAL ADVOC. Q. 7, 9 (Spring 2005).

126. *Hospital Beds and Services List*, FLA. AG. FOR HEALTH CARE ADMIN. (July 2013), *available at* http://ahca.myflorida.com/MCHQ/CON_FA/Publications/docs/HospBedSrvList/Jul2013_HospitalBedsandServicesList.pdf.

127. FLA. STAT. § 395.0197(1)–(2) (2007).

128. FAHCA Acute Care Hospital List (on file with authors).

129. FSHRMPS Licensed Risk Manager List (on file with authors).

130. FSHRMPS Board of Directors Interviews (transcripts on file with authors).

131. Hospital Risk Manager E-Survey Results (on file with authors).

132. *Id.* (on file with authors).

purpose of the Amendment 7 e-survey project. Risk managers were informed that their names would be kept confidential and that de-identified aggregate data would be shared with the FSHRMPS membership upon completion of the study. The e-survey was designed with simplicity in mind and consisted of 13 short multiple-choice questions and one narrative comment question.[133] Three follow-up notices were sent to those who did not respond within ten days of the e-survey being sent and a separate thank-you was sent to all participants.

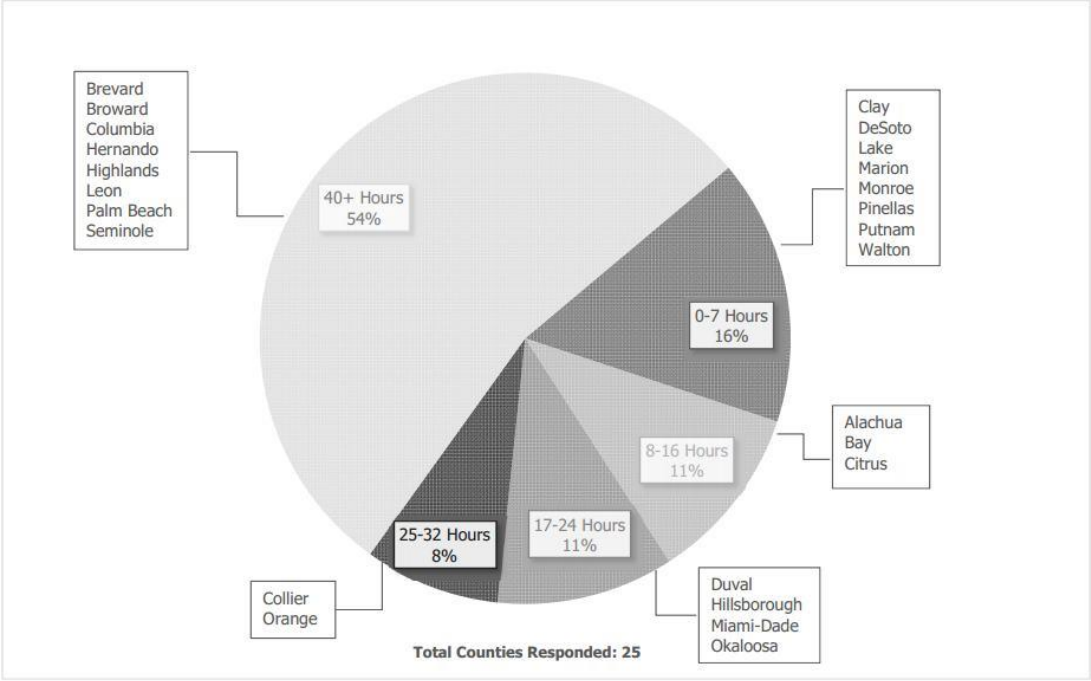
Survey Findings and Analysis

Respondents reported receiving a total of 767 Amendment 7 requests between 2004 and 2013. The survey results indicated that 88% (+/- 5.2%) of respondents had received at least one Amendment 7 request from 2004 to 2013, while 79% (+/- 6.5%) of respondents have received Amendment 7 requests every year since the passage of Amendment 7 in 2004. The majority of respondents (79% (+/- 6.5%)) indicated they received between 1 and 9 requests per year. Some respondents in counties with large populations (such as Miami-Dade) reported receiving more than ten Amendment 7 requests per year.

An overwhelming 98.04% (+/- 2.2%) of respondents reported that all (100%) of their Amendment 7 requests stemmed from or resulted in litigation. When this response is coupled with the reported 8 to 40+ work hours that 84% (+/- 5.8%) of respondents indicated are required to respond to a single request, the impact Amendment 7 has had on Florida hospital workforces and budgets comes into focus. As an example, one hospital in a small Florida county indicated receiving 25 Amendment 7 requests requiring 8-16 hours each in response time of 200 to 400 hours total. Another cost to facilities is increased legal defense fees. For example, 86% (+/- 5.5) of respondents routinely engage outside legal counsel in responding to Amendment 7 requests.

133. *Id.* (on file with authors).

FIGURE 1: AVERAGE WORK HOURS REQUIRED TO RESPOND TO A SINGLE AMENDMENT 7 REQUEST



Less than one percent (0.98% (+/- 1.6%)) of Amendment 7 requests received by respondents are reported to have come from prospective patients interested in selecting prospective health care services.[134] An equally low number (0.98% (+/- 1.6)) of requests were from patients interested in health care services they were currently receiving.[135] Responses to these questions (Questions 7 and 8) were cross-referenced with the final narrative question, which asks "Do you think that Amendment 7 is being used by patients to make informed health care decisions? Please provide your thoughts on whether patients are using Amendment 7 requests to make decisions on prospective or current health

134. *Id.* (on file with authors).
135. *Id.* (on file with authors).

care treatment at your facility." Of the three respondents who answered they had received requests from patients interested in selecting prospective health care services or who are interested in health care services they are currently receiving, we received the following responses to the final narrative question:

"In my opinion, I do not think that patients are using amendment 7 requests to make decisions on prospective or current health care treatment, most if not all requests using Amendment 7 comes from attorney offices on behalf of patients with litigation in mind."

"It's only a tool for plaintiff attorneys."

When the law first passed, we did have a few phone calls requesting their adverse incident reports. We have not seen this since. I do not feel Amendment 7 is being used by patients to make informed health care decisions. This would include prospective or current health care treatment. Every NOI we currently get has an Amendment 7 request.[136]

136. NOI = Notice of intent to initiate litigation. In Florida, prior to filing a complaint for medical negligence, a claimant is required to notify each prospective defendant of their intent to initiate litigation. FLA. STAT. § 766.106(2)(a) (2013). These Notices of Intent are generally accompanied by informal discovery requests. A failure to respond by a prospective defendant "is grounds for dismissal of claims or defenses ultimately asserted." FLA. STAT. § 766.106(2)(a) (2013).

FIGURE 2: SOURCES OF AMENDMENT 7 REQUESTS

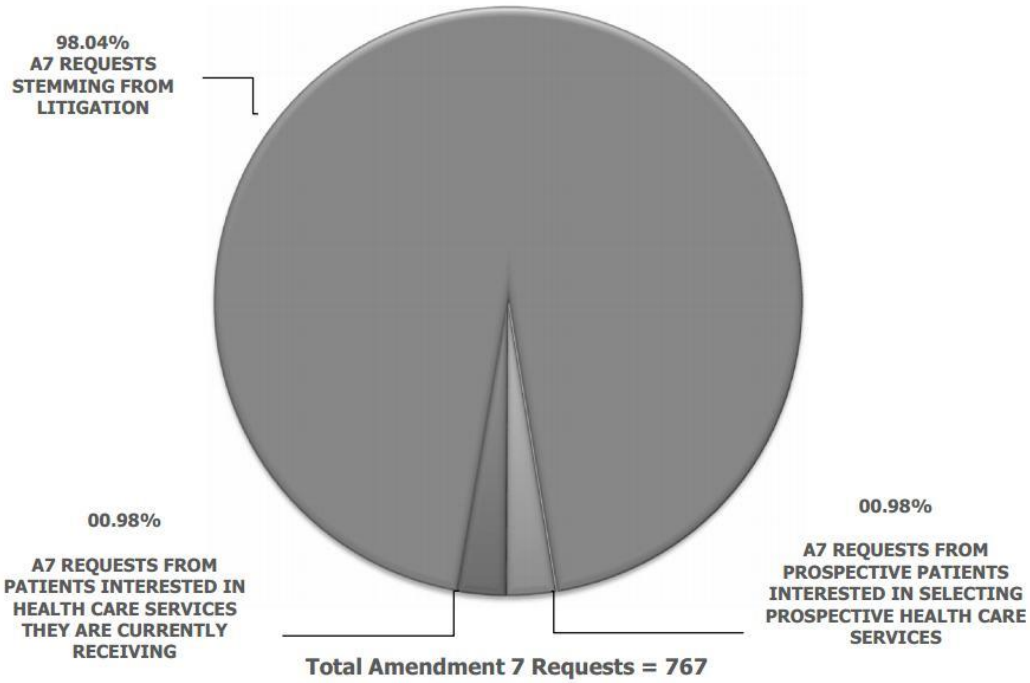


Table 1: Do you think Amendment 7 is being used by patients to make informed health care decisions?

- My experience to date with Amendment 7 requests have all been generated by plaintiffs counsel, not by patients.
- It is only a tool for plaintiff attorneys.
- I have never received an Amendment 7 request from anyone other than a malpractice lawyer.
- No, but mostly because consumers are not aware of the Amendment.
- All requests for Amendment 7 is submitted by plaintiff attorneys, a lot of time and effort go into attempting to keep attorneys from having access to hospital data, incident reports other than the identified patient's and root cause analyses. Time and effort of having depositions of risk managers, hospital administrators, medical staff services and actual team members.
- My experience has been with plaintiff attorneys seeking this information. Their demands/requests have been time consuming and has not identified any benefit to support their claim.
- No. Patients use the data from the various databases that are available (i.e. Hospital Compare, ISMP, MyFlorida and others) on which to base their decisions for where to receive their healthcare. The content within any items related to Amendment 7 requests are so sketchy or bland as to be rather nebulous. This data is also not compared using common denominators with other like organizations making it more anecdotal in nature than something that is useful.
- It is being used by ambulance chasing lawyers to inflate and dramatize their demands.
- Absolutely not. The only requests we receive are attorney requests, most plaintiff attorneys who are filing legal action against us or preparing to file. The current Amendment 7 needs to be removed.
- Not being used to make informed health care decisions. Only requests is from attorneys.
- Amendment 7 information is used for litigation purposes, the request is 100% plaintiff counsel.
- At this time, no patient in our area has made a request to our hospital for records related to Amendment 7.
- No. It is being used by plaintiff attorneys.
- In my opinion, I do not think that patients are using Amendment 7 requests to make decisions on prospective or current health care treatment. Most if not all requests using Amendment 7 come from attorney offices on behalf of patient with litigation in mind.
- Patients are not using Amendment 7 to make decision on prospective or current health care treatment.

VI. TEN YEARS OF AMENDMENT 7

After a decade of reflection, the ballot initiative battles of 2004 caused by the physician versus attorney feud were an unquestionable fiasco for health care in Florida. The millions of dollars the FMA spent were essentially wasted as Amendment 3 fell victim to its own wording. Rather than stating a direct cap on attorney's fees, Amendment 3 was written as "claimant's right to fair compensation" that sets the percentage of recovery a claimant is entitled to receive.[137] Post-enactment, Amendment 3 was determined by the Florida Supreme Court to create a personal right,

137. FLA. CONST. art. I, § 26.

which directly benefited the medical malpractice claimant and, like other fundamental constitutional rights, could be fully waived.[138] Trial lawyers have stated they were "more clever than their physician counterparts" and found a way to "circumvent" the medical establishment's amendment, which some characterized as physicians' "attempts at insulating themselves from medical malpractice lawsuits."[139] According to the AFTL's leadership, Amendment 3 is easily sidestepped by having clients sign waivers of their Amendment 3 rights, which happens on a regular basis, resulting in no real loss of business to the Plaintiff's bar.[140] Curiously, and perhaps tellingly, this option for sidestepping Amendment 3 was openly being discussed by plaintiff attorneys the day after Amendment 3 passed.[141] If AFTL had truly been "clever" and thought of this work-around before the election, it begs the question as to why its members bothered to fight Amendment 3 at all and why their retaliatory initiatives were necessary.

While the loss of any true efficacy from the passage of Amendment 3 was another in a long line of ballot initiative missteps on the part of the FMA, its direct consequence, the passage of the retaliatory Amendment 7, has been a far greater cause of detriment to health care and patient safety in Florida. Along with the infamous "Pregnant Pig" and "Bullet Train" amendments,[142] Amendment 7 has become an exemplification of the shortcomings of Florida's often criticized ballot initiative process[143] due to the way it practically bypassed of all three branches of government to allow the immediate elimination of decades-long statutory peer review privileges overnight, with nothing but the broadest language to initially aid in interpreting its vague parameters.[144] Amendment 7's passage did

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138. *See* Comments and Objections to Proposed Amendment to Rules of Professional Conduct by Floridians for Patient Protection, Inc. at 11, *In re* Pet. to Amend Rules Regulating the Florida Bar, Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct (2005) (No. SC05-1150), *available at* http://www.law.fsu.edu/library/flsupct/sc05-1150/05-1150patientprotection.pdf.

139. Ted Babbitt, *Doctors Still Fighting Disclosure*, BABBITT, JOHNSON, OSBORNE & LE CLAINCHE, P.A., http://www.babbitt-johnson.com/2009/September-2009.pdf. *See also* Babbitt, *supra* note 111.

140. *See* Coombs, *supra* note 16, at 391.

141. *Florida Doctors, Lawyers at Odds Over Effects of Malpractice Amendments*, INS. J., Nov. 5, 2004, http://www.insurancejournal.com/news/southeast/2004/11/05/47480.htm (last visited Sept. 28, 2014).

142. The amendment makes it unlawful for "any person to confine a pig during pregnancy in an enclosure, or to tether a pig during pregnancy, on a farm in such a way that she is prevented from turning around freely." *Florida Animal Cruelty, Amendment 10 (2002)*, BALLOTPEDIA, http://ballotpedia.org/Florida_Animal_Cruelty,Amendment_10_(2002) (last visited May 14, 2014). *See also* Bill Kaczor, *Fla. Pregnant Pig Amendment has Lasting Legacy*, FLA. TIMES-UNION, Oct. 31 2008, *available at* http://jacksonville.com/apnews/stories/103108/D945D9T00.shtml.

143. *Id.*

144. *See generally* Edward J. Carbone, *Discoverability of Records of Adverse Medical*

nothing to alter the fact that peer review, credentialing, event investigations, quality assurance, and risk management activities are still very much required of Florida hospitals and health care providers by various statutes.[145] And while it may be impossible to maintain a precise count, between 2004 and 2014, there have been thousands of Amendment 7 discovery requests to Florida physicians, hospitals, and care providers.[146] The resulting turmoil left Florida health care providers seeking direction on what records were discoverable, who can request records, and what the process should be for identifying and producing the records.[147] Virtually every meaningful attempt over the past ten years to either legislatively or judicially place Amendment 7 into a workable context for Florida hospitals and health care providers in light of their mandatory federal and state obligations to maintain peer review and procedures and systems for risk management, quality improvement, and patient safety has been found to violate the comprehensive rights granted under the amendment.[148] For a telling example of one of the unforeseen

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Incidents, LEXOLOGY (June 10, 2013), http://www.lexology.com/library/detail.aspx?g=a912cdd5-b27d-482a-9661-2acdb55c22f6.

145. FLA. STAT. § 395.0191(8) (2006); FLA. STAT. §§ 395.0193(7)–(8) (2007); FLA. STAT. §§ 395.0197(6)(c)(7), (9), (11) (2007); FLA. STAT. § 766.101(5) (2014); FLA. STAT. § 766.1016(2) (2003). *See The Amendment 7 Challenge: Is a PSO Hype or Hope?*, FOLEY & LARDNER, LLP (Apr. 29, 2008), http://www.foley.com/the-amendment-7-challenge-is-a-pso-hype-or-hope/ [hereinafter *The Amendment 7 Challenge*].

146. The Florida Hospital Association by 2008 was found to have received 400 Amendment 7 requests alone. *See* Florida Hosp. Assoc. v. Viamonte, No. 4:08cv312–RH/WCS, 2008 WL 5101755, at *2 (N.D. Fla. Nov. 26, 2008).

147. Sharon Roberts, *What Remains of Peer Review After Amendment 7?*, S. FLA. HOSP. NEWS (July 2010), *available at* http://southfloridahospitalnews.com/page/What_Remains_of_Peer_Review_After_Amendment_7/5608/1/.

148. *See* FLA. STAT. § 381.028 (2013) (enabling statute for Amendment 7); *see also* W. Fla. Reg'l Med. Ctr., Inc. v. See, 79 So. 3d 1, 11–13 (Fla. 2012) (holding that FLA. STAT. § 381.028(7)(b)(1) (2013) unconstitutionally limits Amendment 7 and that the Health Care Quality and Improvement Act of 1996, 42 U.S.C. § 11101(2) (1997) does not federally preempt Amendment 7); *Buster*, 984 So. 2d at 490 (holding that the Legislature's interpretation of Amendment 7's intent when crafting FLA. STAT. § 381.028 (2007) was too restrictive, although the statute itself did not extend so far as to be unconstitutional). However, the Court further held that because Amendment 7 applies retroactively and is presumptively self-executing, it preempts longstanding immunity and privileges. FLA. STAT. §§ 395.0191(8) (2006), 395.0193(8) (2007), 766.101(5), 766.1016(2) (2003); Bartow HMA, LLC v. Kirkland, 126 So. 3d 1247, 1252–53 (Fla. 2d DCA 2013) (holding that Amendment 7 trumps applicable statutory discovery protections to the extent documents relate to adverse medical incident reporting); Columbia Hosp. Corp. of S. Broward v. Fain, 16 So. 3d 236, 240–41 (Fla. 4th DCA 2009) (holding that Amendment 7 does not exclude discovery requests that are irrelevant, overbroad, or burdensome); Fla. Eye Clinic, P.A. v. Gmach, 14 So. 3d 1044, 1050 (Fla. 5th DCA 2009) (denying petition for certiorari for review on motion to compel discovery of certain reports on the grounds that Amendment 7 precludes any fact-based work product privilege); Lifemark Hosps. of Fla., Inc. v. Herrera, 981 So. 2d 527, 527 (Fla. 3d DCA 2008) (holding that Amendment 7 applies retroactively); Amisub N. Ridge Hosp. Inc. v. Sonaglia, 995 So. 2d 999, 1001 (Fla. 4th DCA 2008) (extending

consequences of Amendment 7 and the upheaval it caused, one need look no further than then-Florida Supreme Court Justice Charles T. Wells' dissent in the landmark Amendment 7 case *Florida Hospital Waterman v. Buster*.[149] Here, Justice Wells decries the majority's decision that the amendment is to be applied retroactively and thereby encompasses existing records created under the belief they were non-discoverable:

> I conclude that the majority's decision is contrary to the law and fundamental fairness. I specifically reject the majority's and the First District's conclusion that the statute, which for over twenty years has protected hospitals' statutorily mandated peer review as part of medical quality assurance, did not establish vested rights that the investigations, proceedings, and records of peer review panels were "not subject to discovery" and could not be introduced into evidence in civil actions. § 395.0193(8), Fla. Stat. (2002). Furthermore, to allow discovery of peer review records containing statements by those who had a right to rely upon the statute's promise that the records would not be discovered or introduced in a civil action is not only legally unsupportable but is fundamentally unfair and puts into jeopardy all statements made based upon the promise of any statutory privilege.[150]

Suggestions to providers on how to function under Amendment 7 have ranged from replacing the existing peer review rating structures with narrative-based peer review systems,[151] to involving outside counsel or general counsel in sensitive peer review discussions in order to invoke opinion work product and attorney-client privileges.[152] Another

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Amendment 7 to cover a nonparty's peer review records); Morton Plant Hosp. Ass'n, Inc. v. Shahbas *ex rel* Shahbas, 960 So. 2d 820, 827 (Fla. 2d DCA 2007) (holding that patient was entitled to adverse medical records under Amendment 7 regardless of whether they were relevant to pending litigation).

149. *See Buster*, 984 So. 2d at 494–503.

150. *Id.* at 495.

151. *See generally Peer Review Since Constitutional Amendment 7 Passed*, BENEDICT AND ASSOCIATES, INC., (June 6, 2006) http://benedictriskmanagement.com/download-central and http://benedictriskmanagement.com/file_download/41/Peer_review_06062006.pdf.

152. *Id* at 2. Using these evidentiary privileges has its shortcomings. Attorney-client privilege can be deemed waived due to disclosures to third parties such as insurers or regulators. Arguments can be made that the materials in question were not made in anticipation of litigation or at the behest of counsel, or that counsel was acting in business or compliance capacity rather than in a litigation capacity. *See* Katherine Mikk, *Making the Plaintiff's Bar Earn Its Keep: Rethinking the Hospital Incident Report*, 53 N.Y.L. SCH. L.R. 133, 140–42 (2008-09). "Fact" work product privilege or protections from discovery of any factual information gathered or prepared in connection with a case has been held to be abrogated by the passage of Amendment 7. *See Fla. Eye Clinic*, 14 So. 3d at 1049. Records prepared in anticipation of litigation that are prepared by clients, at least in part, to assist lawyers are subject to Amendment 7 production. *See*

challenge when responding to an Amendment 7 discovery request has been the breadth of potential documents subject to a request given that providers do not maintain uniform "adverse medical incident" files.[153] Simply determining where to look for responsive documents has been a costly and time-consuming enterprise. Although the Florida Supreme Court in *Buster* struck down the majority of the attempted boundaries the Florida Legislature sought to create in the wake of Amendment 7 with the passage of the enabling legislation, section 381.028(7)(c) of the statute was found not to conflict with the language of the Amendment and was left intact.[154] This section allows providers to request payment for the reasonable cost of compliance with a request, including charges for staff time utilized while conducting a search for documents and any redaction required.[155] Providers have been advised either to file a cost affidavit with the court to limit the scope of the request and seek an advance payment[156] or to contact the requesting party and negotiate a narrowing of the request in light of the costs.[157]

In modest numbers, some Florida providers have either joined or established Patient Safety Organizations (PSOs) seeking federally-created disclosure protections over their peer review and patient safety documents.[158] The Patient Safety and Quality Improvement Act (PSQIA) was signed into law on May 5, 2005, less than a year after Amendment 7's passage.[159] The Act established federal "Patient Safety Work Product" (PSWP) protections for information assembled or created by providers for purposes of reporting to a PSO or that are developed by the PSO in order to conduct patient safety activities.[160] Providers who are

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Lakeland Reg'l Med. Ctr. v. Neely, 8 So.3d 1268, 1270 (Fla. 2d DCA 2009); Acevedo v. Doctors Hosp., Inc., 68 So. 3d 949, 953 (Fla. 3d DCA 2011).

153. *See* Sawran & Weill, *supra* note 125, at 13.

154. *Buster*, 984 So. 2d at 494.

155. FLA. STAT. § 381.028(7)(c) (2005).

156. Weill, *supra* note 112, at 21.

157. *See* Carbone, *supra* note 144.

158. *See The Amendment 7 Challenge*, *supra* note 145.

159. *See* Patient Safety and Quality Improvement Act, 42 C.F.R. § 3.10 (2010).

160. 42 U.S.C. § 299b-21(7) (2005); 42 C.F.R. § 3.20 (2010). The Act defines PSWP as any:

> [D]ata, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements (or copies of any of this material)
> (i) Which could improve patient safety, health care quality, or health care outcomes; and
> (A) Which are assembled or developed by a provider for reporting to a PSO and are reported to a PSO . . . .
> (B)Are developed by a PSO for the conduct of patient safety activities; or
> (ii) Which identify or constitute the deliberations or analysis of, or identify the

members of PSOs submit information to their Patient Safety Evaluation Systems (PSES) for reporting to their PSO.[161] As a result, this peer review information is not subject to discovery, nor is it admissible as evidence in federal, state civil, criminal, administrative, or disciplinary board proceedings against providers.[162] As the negative Amendment 7 case law started to mount, suggested tactical use of PSO protections to countermand effects of Amendment 7 was being discussed.[163] Florida law firms who represent providers have conducted seminars and issued practice updates on the utilization of PSOs toward this end.[164] These conversations were contemporaneous with the listing of "Florida Patient Safety Corporation," the first PSO authorized by the Department of Health and Human Services on November 5, 2008.[165]

CONCLUSION

While this Article has focused on how the doctor/lawyer feud produced Amendment 7 and how it has subsequently been misrepresented and tactically employed by the plaintiff's bar, the greatest "adverse incident" has been on patient safety. It has been estimated that 210,000 to 400,000 patients die annually in U.S. hospitals as a result of medical errors.[166] According to Department of Health and Human Services studies, hospitals rely heavily on self-regulating systems such as incident reporting systems to find safety problems and gain information

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fact of reporting pursuant to, a patient safety evaluation system.

42 C.F.R. § 3.20 (2010). This definition does not include medical records or billing and discharge information. *Id.* Additionally, information that is subject to mandatory state reporting is not protected under the PSQIA, see 42 U.S.C. § 299b-21(7)(B) (2005).

161. 42 U.S.C. § 299b-21(7)(B) (2005).

162. 42 C.F.R. § 3.204(a) (2009).

163. *See The Amendment 7 Challenge*, *supra* note 145.

164. *See* Edward Carbone, *Medical Malpractice Update - Spring 2013*, JD SUPRA BUS. ADVISOR, http://www.jdsupra.com/post/contentViewerEmbed.aspx?fid=0179f761-f963-4cb6-b912-5aecea46df26 (last visited Sept. 28, 2014); *see also* Edward Carbone et al., Presents An Antidote to Amendment 7? How Patient Safety Organizations May Be Able to Help Florida Health Care Providers Protect Risk Management and Peer Review Materials at the 18th Annual Florida Liability Claims Conference (June 5, 2014) (presenting information about patient safety organizations and Amendment 7 for conference for defense lawyers and insurance specialists) (conference schedule *available at* http://fdla.org/pdfs/2014%20FLCC%20%20Brochure.pdf).

165. This PSO voluntarily relinquished its certification with HHR on April 1st 2010. According AHRQ records, four Florida PSOs have voluntarily delisted. *Delisted Patient Safety Organizations*, AGENCY FOR HEALTHCARE RESEARCH & QUALITY, http://www.pso.ahrq.gov/listed/delisted (last visited May 14, 2014).

166. John T. James, *A New Evidence-Based Estimate of Patient Harms Associated with Hospital Care*, 9 J. PATIENT SAFETY 122, 122–28 (2013).

used to improve patient safety.[167] Reports from staff directly involved with patient safety events "provide greater detail and insight about the patient, circumstances, and possible contributing factors (such as specific breakdowns in processes) than information provided by other event detection methods."[168] These reports have the added benefit of focusing staff attention on patient safety issues.[169] Strengthening hospital reporting systems and practices was cited by Centers for Medicare & Medicaid Services (CMS) as "essential" to patient harm prevention.[170] However, physicians have been found to under-utilize reporting systems, in part due to fear of liability and malpractice suits.[171] A national survey of physicians found that, of those with direct personal knowledge of a serious medical error, 46% did not report the error on at least one occasion.[172] Additional research has revealed that 76% of doctors state concerns that medical malpractice lawsuits are detrimental to their providing care to patients.[173] With roughly 1 in 14 U.S. doctors facing a malpractice suit every year, physician concerns may not be that unwarranted.[174] While it is axiomatic that meaningful progress in the field of patient safety will not occur without more effective data analysis from systems that are capturing most adverse patient incidents and the specific contributing facts in which they occur, Amendment 7 has created a system where health care providers are required to document and self-report errors which could directly be used against them in a lawsuit. It is therefore equally axiomatic that progress on patient safety is being severely compromised by the doctor/lawyer feud and, particularly, by Amendment 7. As one Florida doctor stated post-Amendment 7's passage, "I'm afraid if I say constructive [in a peer review setting], it could be taken out of context by a plaintiff attorney, so I'm not going to

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167. OFFICE OF INSPECTOR GENERAL, DEP'T. OF HEALTH & HUMAN SERV., OEI-06-09-00091, HOSPITAL INCIDENT REPORTING SYSTEMS DO NOT CAPTURE MOST PATIENT HARM (Jan. 2012), at 1.

168. *Id.* at 11.

169. *Id.*

170. *Id.* Executive Summary iv.

171. Ethan J. Rowin et al., *Does Error and Adverse Event Reporting by Physicians and Nurses Differ?*, 34 JOINT COMMISSION J. ON QUALITY & PATIENT SAFETY 537, 537–45 (2008) (citing J.A. Taylor et al., *Use of Incident Reports by Physicians and Nurses to Document Medical Errors in Pediatric Patients*, 114 PEDIATRICS 729, 729–35 (2004); L.C. Kaldjian et al., *Reporting Medical Errors to Improve Patient Safety: A Survey of Physicians in Teaching Hospitals*, 168 ARCHIVES INTERNAL MED. 40, 40–47 (2008)).

172. Eric G. Campbell et al., *Professionalism in Medicine: Results of a National Survey of Physicians*, 147 ANNALS INTERNAL MED. 795, 799 (2007).

173. *Common Good Fear of Litigation Study the Impact of Medicine,* Table 17 at 30 (Apr. 11, 2002), http://web.archive.org/web/20071011053929/http://cgood.org/assets/attachments/57.pdf.

174. Jena B. Anupam et al., *Malpractice Risk According to Physician Specialty*, 365 NEW ENG. J. MED. 629, 629–36 (2011).

render any opinion."[175] One overriding theme of the patient-safety movement has been transparency.[176] It has been said that "only through transparency into the occurrence and causes of patient harm can we hope to make substantial medical safety improvement," yet "antagonism and distrust between doctors and lawyers, much of it generated by the current tort system, blocks the road toward transparency."[177] Unfortunately, the courts in Florida have essentially taken the position that "[i]t is not for us to judge the wisdom of the constitutional amendments enacted or the change in public policy pronounced through those amendments, even in instances where the change involves abrogation of long-standing legislation that establishes and promotes an equally or arguably more compelling public policy."[178] Therefore, it would appear that the only potential avenues to effect meaningful change regarding Amendment 7 would be for either the Florida Legislature to propose an amendment to repealing Amendment 7,[179] or for Congress to enact federal legislation that would preempt state law. While the Florida Constitution allows the Florida State Legislature to put a proposed amendment on the ballot, 60% or more of the legislators in the House of Representatives and the Senate must agree to do so in a joint resolution.[180] Given the level of reported influence that plaintiff trial lawyers wield in the Florida Senate, getting a supermajority seems unlikely.[181] However, some commenters have suggested the time may be opportune for federal legislation, either by amending the PSQIA to expressly state that it provides federal privilege and immunity surrounding peer review, credentialing, event investigations, quality assurance, and risk management,[182] or by a "brokered" deal between health care system reformers and doctors to pass new federal legislation that both limits malpractice liability and concurrently reforms fee-for-service payment while improving transparency.[183] By exchanging real federal malpractice reform capping

175. Maureen Glabman, *The Future for Peer Review: Florida's Constitutional Amendment Chills Quality Community*, TRUSTEE MAG., Apr. 2005, at 6.

176. *See* McClurg, *supra* note 6, at 330.

177. *Id.* at 367.

178. *Buster*, 984 So. 2d at 480. (The quoted language was used by the Supreme Court from the written opinion of Judge Sawaya in *Buster*, 932 So. 2d at 344. *See* Sebring Airport Auth. v. McIntyre, 783 So. 2d 238, 244 (Fla. 2001).

179. FLA. CONST. art. XI, § 1.

180. *Id.*

181. Joe Follick, *Insiders Key to Defeat of Rail Deal*, LEDGER (Florida), May 11, 2008, at A1. "I'd argue [trial lawyers are] one of the strongest political forces in the state of Florida. . . . I'd argue they're more powerful than the Democratic Party." *Id.* (quoting Florida Senator J.D. Alexander, R-Lake Wales). "Even the smallest incremental change that would impact their ability to get into court, they are opposed to." *Id.* (quoting Former House Speaker John Thrasher).

182. *See* Coombs, *supra* note 16, at 416.

183. *See* William S. Sage & David A. Hyman, *Let's Make a Deal: Trading Malpractice Reform for Health Reform*, 33 HEALTH AFF. 53, 53–58 (2014).

non-economic damages that does not lead to inequitable results for injured patients for cost savings, physicians and other health care providers are likely to be more at ease disclosing errors, making apologies to patients, and mediating disputes to avoid litigation.[184] However, as the endless political maneuvering over the Affordable Care Act has demonstrated, changing the nation's health care system is next to impossible, and trial lawyers' lobbyists will undoubtedly fight any efforts limiting non-economic damages.[185] Combining the need for liability reform in a way that furthers patient safety, rather than detracts from it, as is the case with Amendment 7, will not be simple, but is a required result. The alternative is another decade or more of the doctor/lawyer feuding with patient safety as the casualty.

184. *Id. See also* William S. Sage et al., *How Policy Makers Can Smooth the Way for Communication—and—Resolution Programs*, 33 HEALTH AFF. 11, 11–19 (2014).

185. Christopher M. Burkle, *Medical Malpractice: Can We Rescue a Decaying System?*, 86 MAYO CLINIC PROC. 326, 332 (2011). *See also* Richard L. Berkowitz & Donna Montalto, *Tort Reform: Why is It So Frequently Unobtainable?*, 116 OBSTETRICS & GYNECOLOGY 810, 810–14 (2010).