Court Tolls Death Knell on Work Product Privilege Over Records Related to Medical Incidents

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By **Chanel A. Mosely** | January 9, 2018

On October 26, 2017, the Florida Supreme Court rendered its opinion in Edwards v. Thomas, No. SC 15-18903, 2017 Fla. LEXIS 2136 (Fla. Oct. 26, 2017) concerning the applicability of Article X, § 25 of the Florida Constitution, known as Amendment 7, to a health care facility or provider's external peer review records. This decision tolled the death knell for any assertion of work product privilege over records relating to adverse medical incidents, including the reports of an external peer review committee and attorney fact work product.

In Edwards, the patient underwent a laparoscopic cholecystectomy at Bartow Regional Medical Center, during which the surgeon clipped her common bile duct but failed to recognize that he had done so. The patient developed severe stomach pain during the postoperative period and ultimately required corrective surgery. In the medical negligence lawsuit that ensued, the patient served an Amendment 7 request on the hospital in which she sought the production of various records relating to adverse medical incidents that had occurred at the hospital. The hospital objected to the requested records, but following several discovery hearings, was ordered to produce not only the incident reports and internal peer review committee records relating to the adverse medical incident, but also specific reports generated in connection with an external peer review, which was conducted at the request of the hospital's attorney. The hospital petitioned for writ of certiorari to the Second District Court of Appeals on the issue of the external peer review reports and the appellate court quashed the trial court's order, holding that the external peer review records were not "made or received in the course of business" and therefore not within the purview of Amendment 7. The patient then petitioned the Florida Supreme Court for review, seeking interpretation and construction of this constitutional provision.

The text of Amendment 7 provides, in pertinent part, that patients "have a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident" and defines an adverse medical incident as "medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported…" (Emphasis added). Additionally, the term adverse medical incident also includes "incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committee." (Emphasis added).

In its October 26, 2017 opinion, the Florida Supreme Court embarked on a comprehensive review of the purpose of Amendment 7 and its scope. In doing so, it applied the principles of construction applicable to statutory interpretation, examining the plain and obvious meaning of the constitutional provision's explicit language. Employing these principles, the Court found that the right to access any record under Amendment 7 relating to any adverse medical

incident necessarily includes, but is not limited to, not only those records previously protected under Florida's licensing statutes, but also the records generated in conjunction with an external peer review. To interpret the scope of Amendment 7 any other way would subvert the inclusion of "including, but not limited to" in the constitutional provision's text.

Noting that several courts across the state have broadly interpreted the constitutional right created by Amendment 7 as an absolute right intended to eliminate any and all restrictions on the discovery of any records relating to adverse medical incidents, the Supreme Court similarly confirmed that Amendment 7's scope is not limited to only those records previously protected pursuant by statute. Rather, it liberally encompasses any records relating to any adverse medical incident, including external peer review records because those documents are generated by a "similar committee" as that phrase is contained within the plain text of the constitutional provision. Because Amendment 7 does not impose any limitations on the definition of "adverse medical incidents," and noting that its content uses the word "any" repeatedly, the Supreme Court concluded that the committees specifically listed in the language of the constitutional provision encompass not only internal peer review committees and other statutorily-mandated committees, but also external peer review committees hired at the direction of a health care provider's legal counsel. Additionally, the Court held that attorney work product which constitutes fact work product - meaning the factual information gathered in anticipation of litigation - is within Amendment 7's reach.

In an ominous closing remark, the Court referenced the issue of an attorney's opinion work product and the attorney-client privilege as they relate to Amendment 7, but declined to address whether those categories of documents come within the purview of Amendment 7. Thus, it is yet to be seen whether the mental impressions, conclusions, opinions, or legal theories of a health care provider's legal counsel may be subject to discovery under an Amendment 7 request, but hospitals, health care providers, and their counsel should proceed cautiously when memorializing such information in writing in the event our Florida courts reach this conclusion in the future.

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