Hospital attorneys brace for 'Patients' Right to Know'

By Bill Hirschman and Carol Gentry

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It has been 3 ½ years since Floridians overwhelmingly passed Amendment 7, the "Patients' Right to Know" about mistakes that occur in hospitals and disciplinary actions against doctors.

Court appeals have delayed implementation of the amendment all this time, but that shouldn't last much longer. In March, the Florida Supreme Court slapped hospitals' arguments aside in appeals of two cases. Justices said Floridians voted for access to hospital records, and that's what they're going to get.

A motion pleading for reconsideration brought a terse denial last week in one of the cases, Florida Hospital-Waterman v. Buster. The document said nothing about the other case, Notami v. Bowen, but hospital attorneys aren't expecting good news. They say their clients need to get ready for a whole new way of doing business.

"It has the potential to be the most significant development in the administration of health care that we've seen in quite some time," said Andrew S. Bolin of Macfarlane Ferguson & McMullen in Tampa.

The Patients' Right to Know amendment, approved by 81 percent of voters in November 2004, overturned decades of secrecy for "peer review" records that had been written into Florida law under the theory that hospitals could do a better job of cleaning house if they could keep proceedings confidential. Amendment 7 gives patients a right to see "any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident."

The term "adverse incident" is so broadly defined that it likely means not just an actual injury but the possibility of an injury, according to Foley & Lardner, a national firm with Florida offices. Such an incident, in health care as in the airline industry, is called a "near-miss." Thus, the proceedings of safety committees that review near-miss cases may have to be turned over on request.

As for the word "patients," it doesn't just apply to individuals who have already been treated, the amendment said and the court affirmed. It apparently can be invoked by any prospective patient – for example, someone who plans to have a procedure done by Dr. Jones might ask for records on his past mistakes.

Amendment supporters had said they wanted Floridians to have enough information to make intelligent decisions about choosing physicians and medical centers. Most medical centers support that unreservedly, said Steven Stark, assistant general counsel for the University of Miami, who spoke at a

recent seminar hosted by the South Florida Hospital and Healthcare Association.
But a majority of record requests since the amendment passed have come from plaintiffs' attorneys in malpractice lawsuits, he said.

While medical centers and physicians expected that, they aren't pleased. They say they fear the chilling effect that opening the sacrosanct peer review meetings will have on witnesses' willingness to testify honestly.

"There's a need for critical self-analysis – especially in a profession that is evolving every day," said William A. Bell, general counsel for the Florida Hospital Association. "There needs to be an open and frank discussion."

The Supreme Court ruled that the amendment opens records from the past, not just those that will be created in the future. People appearing before peer review panels in the past believed their participation would be secret forever.

Bell said there is no cause for panic. The amendment does not require hospitals to reveal who served on the committee. Witnesses will still have immunity from being sued for whatever they tell the committee. There need not be a written transcript of the testimony.

Also, Bell said, civil judges will likely restrict peer review documents from being entered as evidence at trial unless they have a direct relationship to the case.

Hospitals can't stop investigating mistakes and allegations of wrongdoing for fear that their decisions might become public, said Bell. "They can feel comfortable that (some confidentiality) protections are still in place. Peer review is alive and well," he said.

Bell's advice is based in part on the experience of medical centers in Kentucky, which did away with blanket confidentiality of peer review proceedings about ten years ago. Kentucky committees do not put anything in writing that doesn't have to be written down, he said. They hold face to face and phone conversations -- without keeping notes -- rather than discussing substantive issues in letters.

In particular, participants in peer reviews stopped making off-hand editorial comments, personal remarks and unnecessary criticisms. They stopped writing comments in the margins of official notes.

One upside to the amendment is that hospitals are revamping their Byzantine procedures so that it will be easier to respond to records requests, Stark said. The University of Miami's medical center plans to streamline its records system because information is gathered from and kept in myriad locations, he said.

Bolin says records on adverse incidents and safety review committees can be scattered throughout the

hospital, requiring a great deal of time and expense to collect. “It’s not like they’re are all in a neat folder somewhere and we can just pull them out and copy them,” he said.

Lawyers told hospitals that the court allows them to charge the public for every bit of staff time researching, collecting and copying records. This is a way to fend off unfairly broad “vacuum cleaner” requests from lawyers.

“I want the public to be an educated health care (consumer). We all want that,” Stark said. “But I mind lawsuits that say, ‘Tell me all the times you had this kind of problem.’…. Right now, someone says to me ‘Give me everything,’ I'll say, ‘Fine, give us $50,000.’”

It’s not clear whether hospitals can farm out sensitive investigations to law firms whose documents are protected under attorney-client privilege. It’s an issue that hospitals want the Supreme Court to review this summer.

But there’s another possibility: Creating a new group called a Patient Safety Organization. A 2005 federal law allows a hospital or any other entity to create such an agency to conduct peer review. The law also allows some of the organization’s internal deliberations to be confidential. While federal law usually trumps state law, Bell said, it will take time to figure out whether outsourcing will be allowed.