

AMENDMENTS 7 AND 8 UPDATE: LEGISLATION ENABLING THE PATIENTS' RIGHT TO KNOW ACT AND THREE STRIKES RULE

By Melissa Morgan Hawkins

The "Patient's Right to Know" and "Three Strikes" constitutional amendments that Florida voters approved in 2004 were criticized on numerous grounds, including their vagueness and breadth. In 2005, the Florida Legislature passed enabling legislation that attempts to clarify the amendments. This article describes the enabling legislation and the initial judicial interpretations of that legislation, particularly with respect to retrospective vs. prospective application of the enabling legislation.

To the shock of both the medical and defense-oriented legal communities in Florida, the 2004 election brought the passage of Amendments 7 and 8, by voter initiative, as amendments to the Florida Constitution.¹ Amendment 7, entitled "Patients' Right to Know About Adverse Medical Incidents," arguably gave patients access to medical records of "any adverse medical incident."² Amendment 8, entitled "Public Protection from Repeated Medical Malpractice" and commonly known as the "Three Strikes Rule," had the effect of requiring the revocation of the license of any physician with three or more adverse incidents involving medical malpractice.³

Florida's medical and legal communities were understandably concerned when these amendments were passed because Amendments 7 and 8 potentially delivered harsh consequences both to medical professionals and to the legal system aimed at defending them.⁴ Many medical practitioners viewed the amendments as not only a threat to doctors, but also as an impediment to the availability of healthcare in Florida.⁵ Additionally, both amendments contained ambiguities and had a high likelihood of causing confusion upon interpretation.⁶ In response to the ambiguities contained in Amendments 7 and 8, the House and Senate drafted enabling legislation that clarified Amendments 7 and 8.⁷ On June 20, 2005, Governor

Bush signed the legislation into law that enabled and clarified Amendments 7 and 8.⁸ This article discusses the legislation that enabled the passage of these amendments, and future federal legislation that may further affect this area of the law.

I. AMENDMENT 7

Pursuant to the Patients' Right to Know About Adverse Medical Incidents Act, a patient may have access, upon request, to a final adverse medical incident report of the facility or provider of which he or she is a patient, and which involves the same, or substantially similar, condition, treatment, or diagnosis as that of the patient requesting access.⁹ These limitations on the release of records were not contained in the language of Amendment 7.¹⁰ Amendment 7 left many other questions unanswered, such as how it was going to be put into effect¹¹ and how it would interact with already existing rules and regulations, such as the privileged peer review process and the provisions requiring federally protected health care information of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").¹²

A. Subsequent Legislative Enactments Enabling Amendment 7

The day after Amendment 7 passed, several plaintiffs' lawyers sent hospitals requests for the disclosure of

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documents that were created in confidence.¹³ They included cumbersome requests for any adverse incidents related to a specific doctor, regardless of date; all hospital records of adverse medical incidents for a five year time frame; and non-party subpoenas directed at obtaining adverse medical incidents information. Plaintiff's attorneys were using the passage of Amendment 7 as a cast-net to fish for cases. These requests heightened the urgent need for clarification of Amendment 7's implications and enactment of guidelines aimed at protecting confidential information. The enabling legislation passed by the Florida Legislature addresses and clarifies some of these ambiguities and concerns associated with Amendment 7.¹⁴ For example, the enabling legislation clarifies that Amendment 7 does not apply retroactively and correctly restricts the disclosure of information related to peer review.¹⁵

1. Amendment 7 Does Not Apply Retroactively

Had Amendment 7 applied retroactively, it would have effectively required the disclosure of records created under confidential circumstances.¹⁶ The enabling legislation clarified that Amendment 7 does not apply retroactively to records that were created before the 2004 election.¹⁷ The enabling legislation imposes time restrictions on the applicability of Amendment 7, thereby limiting the amount of records subject to release.¹⁸ Most importantly, the enabling legislation applies only to records created, incidents occurring, and actions pending on or after November 2, 2004.¹⁹ Therefore, patients cannot obtain records involving adverse medical incidents that occurred before November 2, 2004, and information disclosed in peer review prior to the passage of Amendment 7 will remain confidential.²⁰ Additionally, as of November 2, 2008, patients are restricted to

requesting records within the four years preceding the date of the request.²¹

While at first blush it may appear that this provision was designed to ensure that providers with an imperfect track record will be limited to exposure for a maximum of four years, this four-year limitation provides physicians and hospitals meaningful guidance on the formation of record-retention policies in the post-Amendment 7 world.

2. Amendment 7's Effect on Confidentiality

Another large concern when Amendment 7 was enacted was the potential for a negative effect on the quality of healthcare in Florida due to the disclosure of otherwise protected information, such as confidential peer review information and information protected under HIPAA.²² The current legislation permits the disclosure of information related to peer review panels or medical review committees.²³ However, the enabling legislation minimizes the content of disclosed information

and restricts the permitted uses of such information, consistent with long-standing policies prohibiting the use of self-critical analysis in litigation.²⁴ Consistent with Amendment 7's purpose as a consumer information measure, the new legislation limits the type of records that patients may obtain to those related to the same or similar diagnosis.²⁵

Before the enactment of the enabling legislation, Amendment 7 had the potential to shatter the peer review process.²⁶ Peer review

has always been a confidential, protected process that is aimed at improving patient care and protecting the public.²⁷

The enabling legislation grants patients a right of access to any records made or received by a health care facility relating to any adverse medical incident, including incidents "reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee."²⁸ However, in its enabling legislation, the Legislature clarified that the purpose of the legislation is "not to repeal or otherwise modify existing laws governing the use of these records... [and] all existing laws concerning the discoverability or admissibility into evidence of records of an adverse medical incident in any judicial or administrative proceeding remain in full force and effect."²⁹ Furthermore,

...the Legislature has clarified that, despite the amendments and enabling legislation, "all existing laws concerning the discoverability or admissibility of records of an adverse medical incident...remain in full force and effect."

the enabling legislation prohibits the discovery and admissibility of this information at trial, and specifies that the information cannot be used for any purpose,

including impeachment, in any civil or administrative action against a health care facility or provider, and does not alter the immunity provided to persons providing information in any peer review panel or medical review committee.³⁰ The legislation also specifies that, during the disclosure of adverse medical incidents, the health care facility may not disclose the identity of the patients involved in the incidents and must maintain any privacy restrictions imposed by federal law, including HIPAA.³¹

The new legislation also clarifies which patients may obtain adverse medical records.³² A patient may only have access to a *final* adverse medical incident report of the facility or provider of which he or she is a patient, which involves the same or substantially similar condition, treatment, or diagnosis as that of the patient requesting access.³³ Prior to the enabling legislation, Amendment 7 broadly defined adverse medical incidents as anything that caused or could have caused injury.³⁴ This expansive definition had the potential to include any patient record, including preliminary notes and telephone messages.³⁵ This would have led to overly burdensome discovery requests such as the ones served to hospitals immediately following the passage of Amendment 7.³⁶ Had the enabling legislation not been passed, hospitals would have invested disproportionate amounts of money and manpower, thus interfering with their daily routines, in an attempt to comply with broad discovery requests. Hospital personnel would have spent precious time away from patients sifting through records and charts in an attempt to locate incidents that *could have* caused injury to a patient.³⁷ The Legislature's clarification can be seen as recognizing that hospital patient safety officers and risk managers should spend time addressing patient safety, not dealing with paperwork.

The enabling legislation correctly limits the type of available information to a final adverse medical incident report, and gives hospitals the right to decide what counts as adverse medical incidents.³⁸ This drastically reduces the amount of hospital money and resources that would have been necessary to comply with Amendment 7 and its subsequent cumbersome discovery requests.

B. Practical Implications of Amendment 7 and its Subsequent Legislation

The enabling legislation appropriately clarifies many of the ambiguities found in Amendment 7.³⁹ For example, Amendment 7 was passed as a means "that would permit patients and prospective patients of health care providers to obtain information concerning adverse medical incidents."⁴⁰ It was not created to alter the existing law regarding the discoverability and admissibility of confidential information in litigation.⁴¹ Instead, the new legislation continues to treat peer review decisions and HIPAA information as privileged, protected, confidential, and non-discoverable for purposes of litigation.⁴² This is consistent with the original purpose of Amendment 7: to provide patients access to information about their medical providers, not to use such information against medical providers in litigation.⁴³

Although the Legislature successfully shed light on much of the uncertainty contained in Amendment 7 by enacting the clarifying subsequent legislation, there is still a great deal of contention about the applicability and enforcement of the legislation's provisions.⁴⁴ Judges in several Florida courts have entered orders ruling on the applicability and constitutionality of Amendment 7 and the subsequent legislation.⁴⁵ In Columbia County, Judge Douglas recently entered an Order directly relating to Amendment 7 and the subsequent legislation.⁴⁶ Judge Douglas ruled that Amendment 7 "is prospective in operation but is retrospective as it relates to extant records."⁴⁷ Judge Douglas then entered an Order that Section 381.028, Florida Statutes (2005), is unconstitutional because "the legislature did not attempt to 'implement' Amendment 7 in enacting Section 381.028, they attempted to abolish it."⁴⁸ In contrast, in Manatee County, Judge

Adams recently entered an Order sustaining Defendants' objections to Plaintiffs' Request to Produce.⁴⁹ Judge Adams ordered that Amendment 7 "cannot be applied retroactively" and "the legislative acts which were passed in order to implement Section 25, Article X, along with other laws, provide for the protections Defendants' urge in their objections."⁵⁰ This clear dissent within the judicial system is indicative of the rift caused by the passage of Amendment 7 and the subsequent enabling legislation.⁵¹ The debate over the applicability of the legislation and its constitutionality will likely continue to divide courts until a binding decision is reached on the matter.⁵²

II. AMENDMENT 8

Pursuant to the recent Repeated Medical Malpractice legislation, no doctor who has been found by the Board of Medicine to have committed three or more incidents of medical malpractice shall be licensed or continue to be licensed by the State of Florida to provide health care services as a medical doctor.⁵³ As passed via voter initiative, Amendment 8 was ambiguous and indefinite, to say the least.⁵⁴ Medical and legal practitioners had many questions as to the effective date of the initial legislation, whether it applied to settlements, and what actions would be considered medical malpractice when applying the Three Strikes Rule.⁵⁵ Upon the enactment of the enabling legislation, the Florida Legislature appropriately addressed many of these concerns and clarified some of Amendment 8's vagueness.⁵⁶

A. Subsequent Legislative Enactments Enabling Amendment 8

Amendment 8 initially raised the question of whether the Three Strikes Rule applied retroactively.⁵⁷ If intended to apply retroactively,

Amendment 8 could have potentially marred the records of doctors currently practicing in Florida, if those doctors had previously committed acts of malpractice either in Florida or elsewhere.⁵⁸ The Florida Legislature, in passing legislation that enabled the Three Strikes Rule, eliminated any ambiguity as to the effective date of the statutes.⁵⁹ The new legislation provides that only incidents that occurred on or after November 2, 2004 may be considered for purposes of prohibition on the licensure for repeated medical malpractice.⁶⁰ Most likely, had Amendment 8 been enacted as originally drafted, some doctors practicing in Florida would have been forced to remove their practices from the state due to the revocation of their license to practice medicine.⁶¹

Amendment 8 also raised another question of whether a settlement counted as a strike under the Three Strikes Rule.⁶² Amendment 8 was silent as to whether settlements specifically counted as strikes.⁶³ Instead, Amendment 8 defined “found to have committed” to include a final judgment of a court of law, final administrative agency decision, or decision of binding arbitration.⁶⁴ At the time Amendment 8 was passed via voter initiative, language also existed in section 458.331, Florida Statutes (2004) that included malpractice settlements as grounds for the board’s denial of a practitioner’s license.⁶⁵ During the drafting of the legislation that enables the Three Strikes Rule, the Florida Legislature also struck the previous language of section 458.331, Florida Statutes that included settlements in its definition of medical malpractice.⁶⁶ The enabling legislation clarified the ambiguity in Amendment 8, and the Three Strikes Rule does not apply to settlements entered into either in a proceeding before a

court of law, or in an administrative proceeding before the Board of Medicine.⁶⁷

A further ambiguously drafted subsection of the original Amendment 8 was the definition of medical malpractice.⁶⁸ Under the provisions of Amendment 8, it was unclear whether a single act of malpractice could potentially amount to multiple strikes if there were more than one claimant or whether it would encompass multiple acts with respect to one claimant.⁶⁹ The new enabling legislation clearly states that an incident of malpractice “means the wrongful act or occurrence from which the medical malpractice arises, regardless of the number of claimants or findings.”⁷⁰ The statute further provides that “[a] single act of medical malpractice, regardless of the number of claimants, shall count as only one incident,”⁷¹ and “[m]ultiple findings of medical malpractice arising from the same wrongful act or series of wrongful acts associated with the treatment of the same patient shall count as only one incident.”⁷² Therefore, under the current legislation, an incident only counts as one strike even if there are multiple claimants or a series of wrongful acts to one patient.⁷³ The statute also specifies that out-of-state judgments only count as a strike if the standard of care and burden of proof applied in the other state equaled or exceeded that used in Florida.⁷⁴

Another clarification to the Three Strikes Rule is the Legislature’s implementation of a new standard whereby the Board of Medicine reviews acts of medical malpractice when considering whether to revoke a medical doctor’s license.⁷⁵ The enabling legislation specifies, “the board shall not license or continue to license a medical doctor found to have committed repeated medical malpractice, *the finding of which was based upon clear and con-*

vincing evidence.”⁷⁶ It is then left up to the discretion of the board to decide whether the facts supporting the finding of an incident of medical malpractice were determined by a standard of clear and convincing evidence.⁷⁷ If the board determines that a standard less stringent than the clear and convincing evidence was used, the board must review the case and “determine whether the finding would be supported under a standard of clear and convincing evidence.”⁷⁸

B. Practical Implications of Amendment 8 and its Subsequent Legislation

The legislation that supplements and enables Amendment 8 properly elucidates many ambiguities found in Amendment 8.⁷⁹ Perhaps the most prominent clarification to Amendment 8 is the implementation of the clear and convincing standard the Board of Medicine will use to review acts of medical practice.⁸⁰ Under Amendment 8, final judgments from jury verdicts potentially counted as strikes.⁸¹ Without the implementing legislation, physicians would be less willing to risk a final judgment being entered against them, and there would be pressure on medical insurers to settle lawsuits brought against physicians, thereby increasing settlement amounts for plaintiffs.⁸² By implementing the clear and convincing standard of review, the legislature greatly alleviated the concern of a surge of malpractice claims.⁸³

Moreover, while there has been frequent opposition to Amendment 7’s enabling legislation,⁸⁴ much of the dissention surrounding Amendment 8 occurred prior to the enactment of its enabling legislation.⁸⁵ When Amendment 8 was passed via voter initiative, plaintiffs and defense attorneys sought clarification of terminology and the implications.⁸⁶ For example, when

Amendment 8 was first enacted, Judge Cohen of Orange County entered an Order granting Florida Hospital Association's motion for a temporary injunction against the implementation and enforcement of Amendment 8 pending further legislation by the Florida Legislature implementing Amendment 8 or the adjournment of the 2005 Florida Legislature without such implementing legislation having been enacted.⁸⁷ The Legislature then clarified any ambiguity regarding the applicability of Amendment 8 when it initiated enabling legislation.⁸⁸ Thus, the law surrounding Amendment 8 and its application is likely to be more stable than the law relating to Amendment 7.

III. ADDITIONAL FEDERAL DEVELOPMENTS

On July 29, 2005, President Bush signed the Patient Safety and Quality Improvement Act of 2005, effective immediately.⁸⁹ This new law amends the Public Health Service Act, and allows health care providers to create voluntary reporting systems involving medical errors and "near misses" in a legally privileged and confidential manner when reported to patient safety organizations ("PSOs").⁹⁰ The data reported to the PSOs will be shielded from use in liability suits, criminal and administrative proceedings, and disciplinary actions.⁹¹ The law only protects information collected or developed for patient safety activities, not for other purposes.⁹² Therefore, a patient's medical record, billing and discharge information or other original patient or provider records are not considered protected.⁹³ If the state's protections are greater than the federal privilege, then the federal law has no effect. If the federal privilege is greater than the state's law, the provider may choose to comply with the federal law and obtain additional protec-

tions, but the entity to which the provider reports must be a certified PSO.⁹⁴ The bill also contains penalties for disclosing confidential information up to \$10,000 if the patient safety work product is identifiable and the disclosure is done knowingly and recklessly.⁹⁵

It is unknown at this time how the guidelines set forth in the Patient Safety and Quality Improvement Act will interact with the provisions that dictate what material is discoverable under Florida's Patient's Right to Know About Adverse Medical Incidents Act.⁹⁶ In the future, this new federal legislation may inadvertently provide a safe-harbor for material otherwise discoverable under Florida's Patient's Right to Know About Adverse Medical Incidents Act.⁹⁷

CONCLUSION

The final ramifications and interpretations of Amendments 7 and 8 and the enabling legislation recently passed by the Florida Legislature will most likely remain unknown for a long period of time. Most likely, a court with binding authority will ultimately find that Amendments 7 and 8 and the enabling legislation are constitutional. The effects of this legislation will continue to change, however, as further legislative and judicial clarification occurs.

¹ Amendment 7 was passed as Article X, § 25 of the Florida Constitution, and Amendment 8 was passed as Article X, § 26 of the Florida Constitution on November 02, 2004.

² Art. X, § 25, Fla. Const. Amendment 7 provides:

SECTION 25. Patients' right to know about adverse medical incidents

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

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

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

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

(2) The term "patient" means an individual who has sought, is seeking, is undergoing, or has undergone care or treatment in a health care facility or by a health care provider.

(3) The phrase "adverse medical incident" means medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees.

(4) The phrase "have access to any records" means, in addition to any other procedure for producing such records provided by general law, making the records available for inspection and copying upon formal or informal request by the patient or a representative of the patient, provided that current records which have been made publicly available by publication or on the Internet may be "provided" by reference to the location at which the records are publicly available.

³ Art. X, § 26, Fla. Const., Amendment 8 provides:

SECTION 26. Prohibition of medical license after repeated medical malpractice. (a) No person who has been found to have committed three or more incidents of medical malpractice shall be licensed or continue to be licensed by the State of Florida to provide health care services as a medical doctor.

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

(1) The phrase "medical malpractice" means both the failure to practice medicine in Florida with that level of care, skill, and treatment recognized in general law related to health care providers' licensure, and any similar wrongful act, neglect, or default in other states or countries which, if committed in Florida, would have been considered medical malpractice.

(2) The phrase "found to have committed" means that the malpractice has been found in a final judgment of a court of law, final administrative agency decision, or decision of binding arbitration.

⁴ Art. X, § 25, 26, Fla. Const.

⁵ See, e.g., Florida Society of Ophthalmology, *Talking Points—Three Strikes (Amendment 8) Legislation*, <http://www.mdeye.org/leg/2313.php> (last visited March 1, 2006).

⁶ See, e.g., Florida Medical Association

Online, *Amendment 7: "Patient's "Right to Know"*, http://www.fmaonline.org/amend7_062005.asp (last visited March 1, 2006) and *Amendment 8: "Three Strikes"*, http://www.fmaonline.org/amend8_062005.asp (last visited March 1, 2006); see also Fowler White Boggs Banker, *Health Care Practice Group Newsletter*, November 2004, available at <http://fowlerwhite.com/pubs/health/AmendBulletin.pdf>.

7 The enabling legislation regarding Amendment 7 was House Bill 1797 and Senate Bill 938, Adverse Medical Incidents, and the enabling legislation regarding Amendment 8 was House Bill 1739 and Senate Bill 940, Repeated Medical Malpractice, in the 2005 Senate session.

8 The Legislature created § 381.028, Florida Statutes (2005), Adverse Medical Incidents, to enable Amendment 7. The Legislature created § 456.50, Florida Statutes (2005), Repeated Medical Malpractice, and amended §§ 456.041, 458.331, and 459.015, as tools to enable Amendment 8.

9 § 381.028, Fla. Stat.

10 See *supra* note 2.

11 See Florida Medical Association Online, *Amendment 7: Patient's "Right to Know"*, *supra* note 7.

12 See James C. Sawran and Robert C. Weill, *Amendment 7: Will the Patient's Right to Know Come at Too High a Price?*, *Trial Advoc. Q.*, Spring 2005, at 11.

13 See, e.g., *Year v. Baptist Hosp. of Miami, Inc.*, No. 01-15812 CA 11 (Fla. Cir. Ct. 11th Dist.) Req. to Prod. To Baptist Hosp. (Nov. 9, 2004); *Sanchez v. Columbia Hosp. Corp. of Kendall, HCA Inc.*, No. 02-29069 CA 27 (Fla. Cir. Ct. 11th Dist.) Third Req. for Prod. To Def. Columbia Hosp. Corp. of Kendall (Nov. 10, 2004) (requesting that Defendants "please provide for inspection and copying all records made or received in the course of business by the defendant pertaining to any "adverse medical incident" for the period inclusive of January 1, 1999 to the present date"); *Slawinski v. Wolfe*, No. 03-7351-CI-20 (Fla. Cir. Ct. 6th Dist.) Notice of Prod. From Non-Party (Nov. 11, 2004).

14 § 381.028, Fla. Stat.

15 *Id.*

16 Art. X, § 25, Fla. Const.

17 § 381.028, Fla. Stat.

18 *Id.*

19 § 381.028 (5), Fla. Stat.

20 *Id.*

21 *Id.*

22 *Amendment 7: Will the Patient's Right to Know come at Too High a Price?*, *supra* note 11, at 11.

23 *Id.*

24 § 381.028, Fla. Stat.

25 *Id.*

26 Art. X, § 25, Fla. Const.

27 See, e.g., § 381.028 (2), Fla. Stat.; see also § 395.0191 (protecting the granting or denial of staff membership and clinical privileges as privileged information); § 395.0193 (protecting and excluding investigations, proceedings, and records of peer review panel, committee of a hospital, a disciplinary board, and other boards with the purpose of review from discovery and introduction into evidence in any civil or administrative action against a provider of professional health services); § 395.0197 (prohibiting public disclosure of internal risk management programs); § 766.101 (preventing discovery and admissibility of investigations, proceedings, and records of any peer review committee; also precluding testimony by any person who was at attendance at a peer review meeting); and § 766.1016 (prohibiting the discovery and admissibility into evidence of patient safety data at any civil or administrative action).

28 § 381.028, Fla. Stat.

29 §§ 381.028 (2), 395.0191, 395.0193, 395.0197, 766.101, 766.1016, Fla. Stat.

30 § 381.028, Fla. Stat.

31 *Id.*

32 *Id.*

33 *Id.* (emphasis added).

34 Art. X, § 25, Fla. Const.

35 *Id.*

36 *Year v. Baptist Hosp. of Miami, Inc.*, No. 01-15812 CA 11 (Fla. Cir. Ct. 11th Dist.) Req. to Prod. To Baptist Hosp. (Nov. 9, 2004); *Sanchez v. Columbia Hosp. Corp. of Kendall, HCA Inc.*, No. 02-29069 CA 27 (Fla. Cir. Ct. 11th Dist.) Third Req. for Prod. To Def. Columbia Hosp. Corp. of Kendall (Nov. 10, 2004); *Slawinski v. Wolfe*, No. 03-7351-CI-20 (Fla. Cir. Ct. 6th Dist.) Notice of Prod. From Non-Party (Nov. 11, 2004).

37 Art. X, § 25, Fla. Const.

38 § 381.028, Fla. Stat.

39 *Id.*

40 *In re Advisory Opinion re Amendment 7*, 880 So. 2d 617, 618 (Fla. 2004).

41 *Id.*

42 *Id.*

43 Art. X, § 25, Fla. Const.

44 § 381.028, Fla. Stat.

45 Order on Motions Re: Amendment 7, *Bowen v. Notami Hosp. of Fla., Inc.*, 04-543-CA (Fla. 3d Cir. Ct. July 15, 2005), cert. denied, 892 So. 2d 1019 (Fla. 1st DCA 2005); see also Order, *Beane v. Pare and Martin Memorial Medical Center*, 02-919 CA (Fla. 19th Cir. Ct. 2005) (Makemson, J.) (holding that Amendment 7 applies retroactively and Section 381.028 is unconstitutional because it conflicts with Article X, Section 25 of the Florida Constitution); Order, *Kroll v. Sedigheh Zolfaghari, North Broward Hosp. Dist.*, 96-4960 (09) (Fla. 17th Cir. Ct. 2005 (Andrews, J.) (holding that Amendment 7 applies retroactively and that Section 381.028, Florida Statutes, is unconstitutional to the extent that it frustrates the purpose of the amendment).

46 Order on Motions Re: Amendment 7, *Bowen*, 04-543-CA (Fla. 3d Cir. Ct. July 15, 2005).

47 *Id.*

48 *Id.*

49 Order, *Lynch v. Tabaie*, 2005-CA-545 (Fla. 12th Cir. Ct. Sept. 15, 2005).

50 *Id.*

51 Art. X, § 25, Fla. Const., § 381.028, Fla. Stat.

52 *Id.*

53 § 456.50, Fla. Stat.

54 Art. X, § 26, Fla. Const.

55 *Id.*

56 §§ 456.041, 456.50, 458.331, 459.015, Fla. Stat.

57 Art. X, § 26, Fla. Const.

58 *Id.*

59 § 456.50, Fla. Stat.

60 *Id.*

61 See <http://tampa.about.com/library/weekly/blamend8.htm> (last visited March 21, 2006).

62 See Florida Medical Association Online, *Amendment 8: "Three Strikes"*, *supra* note 6.

63 Art. X, § 26, Fla. Const.

64 *Id.*

65 § 458.331, Fla. Stat. (2004).

66 § 458.331, Fla. Stat. (2005).

67 § 456.50, Fla. Stat.

68 Art. X, § 26 (b) (1), Fla. Const.

69 *Id.*

70 § 456.50 (1) (d), Fla. Stat.

71 § 456.50 (1) (d) (1), Fla. Stat.

72 § 456.50 (1) (d) (2), Fla. Stat.

73 § 456.50, Fla. Stat.

74 § 456.50 (1) (g), Fla. Stat.

75 § 456.50 (2), Fla. Stat.

76 *Id.* (emphasis added). The clear and convincing evidence standard is defined as producing in the mind of the trier of fact a firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. *State v. Mischler*, 488 So. 2d 523 (Fla. 1986). It is an intermediate standard of proof that requires more than a preponderance of the evidence and less than proof beyond a reasonable doubt. *R.S. v. Dept. of Children and Families*, 831 So. 2d 1275 (Fla. 4th DCA 2002).

77 § 456.50 (2), Fla. Stat.

78 *Id.*

79 §§ 456.50 456.041, 458.331, 459.015, Fla. Stat.

80 § 456.50 (2), Fla. Stat.

81 Art. X, § 26, Fla. Const.

82 See http://www.flhosp.org/new/healthissues/healthbrf_amends378.pdf (last visited March 21, 2006)

83 §§ 456.041, 456.50, 458.331, 459.015, Fla. Stat.

84 See *supra* n. 31.

85 Art. X, § 26, Fla. Const.

86 *Id.*

87 Order, *Florida Hosp. Assoc., Inc. v. Florida Agency for Health Care Admin.*, 2004-CA-002483 (Fla. 2d Cir. Ct. Dec. 1, 2004).

88 §§ 456.041, 456.50, 458.331, 459.015, Fla. Stat.

89 Pub. L. No. 109-41, § 2 (a) (5), 119 Stat. 424, 424-34 (2005).

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*; see also § 381.028, Fla. Stat.

97 *Id.*; see also § 381.028, Fla. Stat.