

Blog Post

You Can't Always Get What You Want

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The Florida Fifth District Court of Appeal harmonized the interpretation of state statutory and constitutional language in the first post Amendment 7 [case](#) dealing with access to adverse medical incident reports and their use at trial. The Florida statutory prohibition against the use and admissibility of certain incident reports was postulated to conflict with the state constitutional access to adverse medical incident reports. This statutory provision in Florida Statutes §395.1097 pre-existed the adoption of Amendment 7. The Clear text of Florida Statutes §395.0197 states, “the incident reports are part of the work papers of the attorney defending the licensed facility in litigation relating to the licensed facility and are subject to discovery, but are not admissible as evidence in court.” The trial court had ruled that the adverse medical incident reports were accessible, under Amendment 7, but were not admissible under the Florida Statutes. The jury found on behalf of the hospital that there was no negligence that was a legal cause of loss, injury or damage.

In considering the effects of constitutional amendments upon existing statutes, the Florida law is that the statute will continue in effect unless it is completely inconsistent with the plain terms of the state Constitution. The courts are duty bound to harmonize and reconcile the new constitutional provision with the existing law.

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Amendment 7 is specific that patients are entitled to have access to any adverse medical incident reports both for inspection and copying. The argument for interpreting Amendment 7 contended that allowing access allows use of the documents in trial testimony and evidence for the jury. The Fifth District ruled that the establishment of the right of access without a specific establishment as to its use is neither included in the definition of, nor a necessary predicate to access. Citing the United States Supreme Court decision that to supply omissions to a statute transcends the judicial function, it continued based on a Florida Supreme Court decision, that courts are not at liberty to add words that were not placed there originally or to ignore words that were expressly placed there at the time of the adoption of the provision.

In further support of its decision, the Fifth District held that the intent of the Florida Constitution is determined from its text. The text foreclosed a positive right to “use.” Secondly, further Florida Supreme Court rulings indicate that extrinsic guides of construction are not allowed to defeat the plain language. Therefore, while Amendment 7 defined access, it was silent as to use and admissibility. That silence demonstrates that use and admissibility are beyond the Amendment’s constitutional scope.

Consequently, under this interpretation of the law, the Plaintiffs got what they wanted, access to the incident reports. However, they did not get what they needed, to be able to use that information in front of the jury. Therefore there will likely be future iterations of this theme regarding potential use of incident reports. For example, either party to such litigation could seek to use an incident report. How each party attempts to accomplish that is the question. For example, there is a distinction between fact work product and opinion work product. Could an incident report that directly contradicts the testimony about the facts of the case, be used for impeachment as to the facts alone? Under the present interpretation of the law, that cannot

happen, which likely will be challenged in court as well. The documents still may not be admissible. However, there may be many different ways that both parties may be able to demonstrate what they need using this data. As application of this law increases, challenges to its interpretation will mount as well.

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