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**Memorandum**

*April 24, 2019*

*To: Debra J. Parsons, MD, President  
Colorado Medical Society*

*From: Andrew Bolin, JD, Bolin Law Group  
Tampa, Florida*

*The following is in response to your request for an assessment of the impact on patient safety in Florida since professional reviews records were determined to be discoverable.*

Florida's removal of peer review and quality improvement privileges for health care providers took place in November of 2004 after a strong and concerted effort by the Plaintiff's bar to have the initiative placed before voters. The provision, billed as the "Patient's Right to Know," gave unprecedented access to any records made or received by a health care facility or provider relating to "adverse medical incidents." The initiative sought to roll back confidentiality and privilege that had been the cornerstone of quality improvement measures in the state's hospitals for decades. An article in Florida Bar Journal noted, "Amendment 7 represent[ed] one of the most sweeping changes in law and public policy ever adopted in [Florida]." Vol. 83, No. 3 March 2009 Pg. 20, J.B. Harris.

**Patient Safety Systems Sacrificed for More Lawsuits**

The 2004 initiative did not bring clarity or finality to how health care providers were to accomplish the function of making health care safer in the State. What is clear is how the "Patients Right to Know" initiative has been used by plaintiff's attorneys as a tool for discovery in medical malpractice litigation. Self-critical analysis taken out of context and misinterpreted by judges and juries has wreaked havoc on quality improvement in Florida and resulted in dozens of battles in the courts throughout the State and Federal system. Litigation pitted legislative language and intent against the State appellate courts' interpretation of how the new law should operate, striking limiting language as unconstitutional and continually broadening the scope of what items were discoverable in litigation. State trial and appellate courts were understandably ill equipped to grasp the breadth of the information created by the various peer review and quality assurance committees to improve patient safety. Court decisions raised further questions and led to even more litigation in the ensuing fifteen years, such that Florida health care providers

continue to the present day to seek the Court's guidance on issues unforeseen by previous courts and the State's Legislature.

### **Providers Reluctance to Participate in Effective Peer Review Not Just Theoretical in Florida**

The concept of health care providers being reluctant to participate in effective peer review for fear of retaliation and litigation was not just theoretical in Florida. From the date of the elimination of the privilege, providers immediately began to experience the impact of this new framework.

Facilities immediately began seeing some providers resign from peer review committees and raise questions about what protections their facilities could offer them against eventual defamation or tortious interference claims that might arise from their involvement in the peer review process.

In an effort to comply with State and Federal mandates for quality assurance processes, providers began searching for ways to limit or "explain" their findings in different ways. Many providers began moving toward "verbal" quality assurance and peer review methods only, attempting to eliminate written documents that would then be used improperly against them. Unfortunately, these methods limited the effectiveness of peer review and its uses. Providers became frustrated with an inability to communicate their findings and reliably recall and rely upon the recognition of the incidents experienced by others. Moreover, some providers suffered fines and increased exposure from licensing and accreditation boards for their new methods of quality assurance because those bodies found them to be less effective.

### **Patients Not Using Ability to Access Peer Review and Quality Improvement Records**

The newfound ability to access peer review and quality improvement records is not being utilized by prospective patients to make informed decisions about health care or raise the level of discourse about improved patient care. A large health care organization consisting of multiple hospitals and a large physician practice group in the Tampa Bay area estimates that, "less than 1/2 of 1 percent of any requests for such materials come from patients seeking information for health care purposes. The full balance of the requests come from plaintiff attorneys who are now seeking damages in litigation against providers." Another provider on the east coast of Florida has estimated "seeing less than 10" total requests by patients who were not plaintiffs, while the law allowing access to these records is now a "standard request made in discovery in every medical malpractice case they face."

### **Fully 70% of Florida Physicians Not Comfortable Serving on Peer Review Committees**

Based on these experiences, it is not difficult to understand why a full 70% of physicians polled by the Florida Medical Association are not comfortable serving on peer review committees. Any state legislature should give careful consideration to the unintended consequences of Florida's experience before enacting legislation to make peer review and quality assurance information discoverable in civil litigation.