

# Risk Rx

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## HSC Self-Insurance Program

### Amendment 8: Its Impact Still Unknown

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Amendment 8, more commonly known as the "three-strikes rule" was implemented by the Florida legislature in Senate Bill 940 after the Florida electorate overwhelmingly approved the proposed amendment to the Florida constitution. The Bill amended sections of Chapter 458 and 459, Florida Statutes (the Medical Practice Act and Osteopathic Medical Practice Act, respectively). The Amendment prohibits physicians who have had three or more incidents of medical malpractice, proven by clear and convincing evidence, from being licensed to practice medicine in Florida.

Sponsored by Floridians for Patient Protection, a group created by the Academy of Florida Trial Lawyers, the stated intention of the Amendment was to reduce the number of malpractice incidents occurring in Florida. The Florida Medical Association (FMA) strongly opposed the Amendment, asserting that the health care community would lose health care providers in all specialty fields, but more particularly in high risk practices, including neurosurgery, cardiovascular surgery, obstetrics/gynecology and trauma. Consequently, the shift of physicians from Florida to more physician-friendly states would result in limited access to medical care for patients statewide.

One critical component of the Amendment is the definition of "repeated medical malpractice." Medical malpractice has been defined as the failure to practice medicine in accordance with the level of care, skill, and treatment as a similar provider under similar circumstances. "Repeated medical



malpractice" is defined by the Amendment as three or more incidents of medical malpractice found to have been committed by a medical doctor. It includes any similar wrongful act, neglect or default committed in other states or countries which, if committed in Florida, would have been considered medical malpractice.

Another critical component of the Amendment is a "strike." A strike is defined as a final judgment by a court or agency that has been supported by clear and convincing evidence. More specifically, a strike occurs if there is:

1. A final order of an administrative agency following a hearing where the licensee was found to have committed medical malpractice;
2. A final judgment of a court of law entered against a licensee where the licensee was found to have committed medical malpractice in a civil court action; or
3. A decision of binding arbitration where the licensee was found to have committed medical malpractice.

The enabling legislation to the Amendment in SB 940 requires that the Board of Medicine shall not license or continue to license a medical doctor found to have committed repeated medical malpractice, the finding of which must be based on clear and convincing evidence. The provision contained at 456.50(2), Florida Statutes, goes on to state that "in order to rely on an incident of medical malpractice to determine whether a license must be denied or revoked under this section, if the facts

# Risk Rx

Vol. 3 No. 3 July-September 2006  
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## HSC Self-Insurance Program

supporting the finding of the incident of medical malpractice were determined on a standard less stringent than clear and convincing evidence, the board shall review the record of the case and determine whether the finding would be supported under a standard of clear and convincing evidence." It appears that the Board is required by the statute to reweigh the evidence contained in the record of the medical malpractice case (that could be thousands of pages), which it is not permitted to do if the case was heard at the Division of Administrative Hearings (DOAH) as part of a licensure disciplinary hearing. In an administrative action where the matter was heard at DOAH, the Administrative Law Judge would issue a Recommended Order for consideration by the Board. The Board is not permitted to reweigh the evidence and generally must uphold the recommendation of the Administrative Law Judge if the record contains competent and substantial evidence.

The last critical component of the legislation discussed in this article is the definition of "clear and convincing evidence." It has been defined in various court opinions as an intermediate standard of proof, more than "preponderance of the evidence" standard used in most civil cases, and less than the "beyond a reasonable doubt" standard used in criminal cases. Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be precise and explicit and the witnesses must be lacking confusion as to the facts. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. See Slomowitz v. Walker, 429 So.2d 797 (Fla. 4th DCA 1983).

The plain language of Amendment 8 and 456.50(2), Florida Statutes, indicates that the triggering of a strike is the result of some final action, whether it be by a court of law, the Board of Medicine or through arbitration. The final action must determine that the physician is guilty of medical malpractice as that term is defined above. There are ways to avoid a "finding" that the physician engaged in medical malpractice. Legal counsel for physicians in medical negligence cases and Department of Health investigations will have to counsel their clients as to different settlement options in cases so as to avoid a final action or order that asserts the physician was guilty of medical malpractice. Thus, the legislation may have some of its intended effect, i.e., to encourage settlement of cases or investigations that involve standard of care issues.

In considering the above issues, it is not surprising that the Amendment could significantly affect the legal community and prospective medical malpractice plaintiffs. The knowledge that a physician may feel compelled to settle a matter to avoid a strike is much to the favor of the prosecuting party in settlement negotiations. It is anticipated that an aggressive attorney or plaintiff will use the Amendment to his or her advantage, thereby likely further decreasing a chance for a fair and reasonable settlement value. Frivolous and meritorious cases may settle for more moderate amounts, leaving physicians and insurance companies with their hands somewhat tied.

It is further expected that Amendment 8 may affect the relationship between physicians, attorneys and medical malpractice insurance carriers. This relationship, also known as the "tripartite relationship," is already regarded as being highly complex, typically given that the attorney represents the insured, with the

# Risk Rx

Vol. 3 No. 3 July-September 2006  
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## HSC Self-Insurance Program

insurer having the status of a non-client third party payor of the attorney's fees. See Florida Bar Comment 4-1.7 and Fla. Stat. Ch. 627.

A physician may insist upon settling a matter to avoid a potential judgment and thus a strike with the carrier that is providing insurance coverage. The insurance carrier, who of course must pay the settlement, may feel that the case should be vigorously defended. While that issue is not a new one, the added issue of a "strike" has the potential to complicate the relationship even more.

The future of the impact of Amendment 8 is unknown, and may ultimately be difficult to ascertain. One thing is certain, its impact will further complicate an industry that is already heavily regulated.

## License Not Required to Practice Risk Management

Jan Rebstock, RHIT, LHRM, CPHRM



Risk management is one of the few professions health care staff on all levels can practice without a license.

The reason is that risk identification and loss prevention is not a task relegated to a titled few; it is one of those fundamental responsibilities we all share as part of a health care team.

Each time you explain a procedure to a patient, check for allergies, verify patient identification prior to treatment, perform a surgical count, mop up a spill, hold a

trembling hand or perform any other random act of kindness; you are practicing risk management.

Risk Management by nature, is often a reactive response to reported events with the silver lining being identification of areas which can be improved. However, the gold standard of an effective risk management program is the ability to avert or preempt a potential loss or unexpected outcome. To achieve that standard, risk managers rely on those who can best evaluate and assess health care practices on an ongoing basis; those who render daily care and services.

Granted, there is no dearth of policies and procedures to follow, professional practice and regulatory standards with which to comply or quality and patient-safety related committees to whom to report or provide oversight in the quest for improved patient care. Yet, risk reduction efforts are undoubtedly more successful when they invite voluntary recommendations and creative ideas for positive change before an undesirable event occurs.

So feel free to practice risk management, feel empowered and motivated to challenge the status quo by reviewing processes through the critical eye of expertise, feel compelled to suggest and implement solutions that will prevent or minimize risk. After all, risk management is an intrinsic part of what health care professionals do.





## Legal Case Review

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**Case Summary:** Nardone v. Reynolds:  
The effect of fraudulent concealment on the medical malpractice statute of limitations.

In Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976) *reh'g den.* 546 F.2d 906 (5<sup>th</sup> Cir Fla. 1977), the Florida Supreme Court reviewed when a medical malpractice matter accrues. The Court addressed numerous certified questions, however, the focus of this review is upon situations where the statute of limitations was extended beyond the two years from the time of discovery due to issues of fraud, concealment or intentional misrepresentation; an issue of first impression in Nardone.

Briefly, this matter involved 13-year old Nicholas Nardone, who presented to Jackson Memorial Hospital with blurred vision, poor coordination and headaches. Nardone underwent several brain operations over a three-month stay at the hospital. His condition involved an obstruction of the Sylvius aqueduct, for which a shunt was inserted to bypass the aqueduct and permit the flow of spinal fluid between the ventricles of the brain into the right side of the child's head. After some complications with the shunt, a pantopaque ventriculogram (PPV) was performed, contrary to proper procedure which demonstrated at the time that such should

not be completed where there is a shunt. The pantopaque entered the shunt and the veins of the child's neck, and the child's condition subsequently worsened. Upon being discharged from the hospital, the child was blind, comatose and had suffered irreversible brain damage. The parents were not told that the PPV would be administered or that it was performed. They were advised that the child's condition had simply deteriorated and the physicians had not disclosed the course of treatment to the parents despite being asked to do so. During subsequent care at another hospital, Jackson Memorial provided excerpts of the records requested. However, four years later, the records were again requested, and on this occasion, included the report of the PPV.

**Allegation:** The parents of Nardone alleged that though the statute of limitations had run, they should still be entitled to bring their medical malpractice cause of action as they were unaware of the circumstances leading to their child's deteriorating condition.

**Analysis:** In short, the Florida Supreme Court held that the statute of limitations in a medical malpractice case commences when:

1. The plaintiff has notice of the negligent act giving rise to a cause of action or
2. when the plaintiff has notice of the physical injury caused by the negligent act. See Nardone; Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990).

The Nardone Court ultimately held that the physicians' non-disclosure of the possible causes of the child's medical condition, unaccompanied by misrepresentation, did not toll the statute of limitations in a malpractice action. See *id.* at 27. Instead,

# Risk Rx

Vol. 3 No. 3 July-September 2006  
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## HSC Self-Insurance Program

the Court held that though the parents did not have knowledge of the cause of their son's condition, they had knowledge of the condition, and through exercise of reasonable diligence, were on notice of the possible invasion of their legal rights. See id. at 32.

However, of great importance is the Court's holding that the statute will be tolled where actions by the defendant substantiate fraudulent concealment. The two elements required before the equitable principle of fraudulent concealment will be utilized to toll the statute of limitations are:

1. The plaintiff must show successful concealment of the cause of action, and
2. fraudulent means to achieve the concealment. See Nardone at 37.

A demonstration of fraudulent concealment includes a circumstance where a plaintiff can bring forth evidence that a defendant prevented the discovery of the injury through means of fraud, by intentional misrepresentation or concealment. If the plaintiff is successful in proving these elements, the statute of limitations period will be extended.

In terms of active misrepresentation, such may be evidenced by an active effort by the guilty party to fail to disclose information where a fiduciary or confidential relationship exists, and where a duty to disclose material information exists. See Nardone at 38; Nehme v. Smith-kline Beecham Clinical Laboratories, Inc., and Menendez v. Public Health Trust of Dade County, 566 So.2d 279, 281 (Fla. 3d DCA 1990) ("when defendants actively misrepresent or conceal their negligence, or conceal known facts relating to the cause of the injury, the statute of limitations does not begin to run

until plaintiff is able to discover the negligence.")

**Risk Reduction Strategies:** From Nardone and subsequent cases, we gain an understanding of when a cause of action accrues and how the statute of limitations may be tolled through fraudulent concealment and active misrepresentation. However, in understanding the importance of the physician-patient relationship and the fiduciary duty encompassing the relationship, it is equally essential to understand your rights as a health care practitioner.

1. First, the defrauding party must have knowledge of the facts concealed. (i.e. a physician cannot be found to have committed fraudulent concealment where a hemostat is unknowingly left in a patient's body.) See id.



2. The physician-patient relationship is of a fiduciary nature, imposing a duty on the parties to disclose material information between the parties. See Nardone at 37; Testone v. Adams, 373 So.2d 362 (Fla. 1<sup>st</sup> DCA 1979) While fraudulent concealment by a defendant which serves to prevent a plaintiff from discovering his or her cause of action will toll the statute of limitations until the facts of such concealment can be discovered through due diligence, it is essential to recognize that a physician need not disclose all potential causes of

# Risk Rx

Vol. 3 No. 3 July-September 2006  
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## HSC Self-Insurance Program

- poor consequences where no request was made to know the cause. See Nardone at 37.
3. As the Court stated in Nardone, where the symptoms or condition are such that the physicians in the exercise of reasonable diligence cannot reach a judgment as to the exact cause of the injury or condition and can only conjecture or hypothesize as to potential causes, he or she is under no duty to disclose a conjecture of which he or she is unsure. See Nardone at 39. There is no concomitant duty imposed on the physician to relate all merely possible or likely causes of the injury. See Nardone at 43.
  4. A physician's silence as to an unverifiable possible cause does not substantiate fraudulent withholding which will toll the statute of limitations. See Nardone at 39.
  5. A prospective plaintiff's ignorance of easily discoverable facts substantiating a cause of action does not toll the statute of limitations if the facts could have been discovered through due diligence. See Nardone at 42.

Examples of continuing fraudulent concealment may include:

- A surgeon who knowingly left a ball of gauze in his patient's abdominal cavity following an operation, and failed to advise the patient of this fact. See Burton v. Tribble, 189 Ark. 58 (1934).



- A dentist fraudulently concealed that he left a piece of broken metal in an area of bone structure following the removal of an impacted wisdom tooth and where x-rays taken ten months following removal confirmed this. Proctor v. Schomberg, 63 So.2d 68 (Fla. 1953).

In such cases, the statute of limitations would not begin to run until the patient discovered or had a reasonable opportunity to discover the injury.

6. Recent case law evidences the slow evolution of more specific parameters to the fraudulent concealment doctrine and tolling the statute of limitations. It is reasonable to expect that each case involving a potential tolling of the statute of limitations will be fact intensive and in strict consideration of the information disclosed to the patient or the patient's family. A health care practitioner should ensure that his or her relationship with the patient demonstrates a respect of the fiduciary relationship, yet does not unnecessarily warrant exposure to litigation.



7. The holding in Nardone has resulted in subsequent harsh rulings. Prospective plaintiffs argue that Nardone has put defendants in more advantageous positions as it placed a heightened burden on plaintiffs, requiring them to have an enhanced knowledge of the specific logistics of a patient's quality of received care to avoid losing an

# Risk Rx

Vol. 3 No. 3 July-September 2006  
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## HSC Self-Insurance Program

opportunity to seek legal recourse for malpractice. However, defendants contend that as a result of Nardone, litigation is increased as individuals will proceed with a lawsuit, even without sufficient basis, rather than risk losing their opportunity for legal recourse per the statute of limitations. Courts have attempted to address this very issue through more stringent requirements to sustain a cause of action. This is difficult, however, as the nature of certain injuries may apparently have resulted from medical malpractice, yet there are situations where the injury could have resulted from natural causes.

8. It should be noted that the premise set forth in Nardone should be considered against case law regarding the statute of repose, which further exemplifies the ongoing confusion in terms of when an action may be brought.
9. Since the landmark decision in Nardone, the Legislature has further clarified a physician's duty to disclose adverse incidents. As to health care practitioners, Fla. Stat. 465.0575 requires:
  - A. every licensed health care practitioner to inform each patient, (or, if the patient is developmentally disabled or incapacitated, the patient's spouse, adult child, parent, adult sibling, adult relative, close friend, proxy, surrogate or guardian) in person about adverse incidents that result in serious harm to the patient.
  - B. Similarly, Fla. Stat. 395.1051 and 395.0197 discusses a hospital's duty

to notify patients of adverse incidents, and requires this be done by an appropriately trained person designated by each licensed facility.

*It is important to remember that disclosures in compliance with these statutes shall not constitute an admission of liability, nor can be introduced as evidence in a legal claim.*

Shands Healthcare core policy and procedure on disclosure can be found on the Shands Intranet:

<http://intranet.shands.org/licacc/intranet/policies/cp1.43.pdf>

If you have any questions or comments about this case review, feel free to email me or call me at 407-691-0500.

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