

Risk Rx

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HSC Self-Insurance Program

Florida's Good Samaritan Act:



A little protection is better than none.

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Dr. Smith is driving down the road, happily going home from a busy day in the OR. Suddenly, a truck pulls out in front of an on-coming car. While Dr. Smith successfully avoids being in the wreck, and does call 911, does she risk a lawsuit if she stops to render assistance?

Jeff Jones, CRNA, is a member of a Community Emergency Response Team that has been activated by his county as a result of an approaching hurricane. What risks does he undertake if his team discovers injured people and renders emergency treatment?

Dr. Williams is at the hospital seeing his own patients on the floor, when a Code Blue is called in a nearby location. Dr. Williams responds to the Code, which does not involve one of his patients. What standard of care would apply if the patient sued Dr. Williams?

Lawsuits against people who gratuitously stop to help others in an emergency are, fortunately, rare. To encourage assistance in emergencies, most states have "Good Samaritan" laws, whose purpose, generally, is to protect individuals who attempt to help injured persons in an emergency from being sued or bankrupted as a result of their charitable impulse. These laws differ (often radically) from state to state; this article examines the scope of Florida's Good Samaritan Act and examines what the Act actually accomplishes in terms of protecting individual "Good Samaritans".

When Does Florida's Good Samaritan Act Apply?

First of all, we need to look at exactly when Florida's Good Samaritan law comes into play.

1. Emergencies outside a hospital or health care facility

Florida law applies to *any* person, including medical professionals, who renders care to victims at the site of an emergency (where proper medical equipment is not available), or in direct response to emergency situations that arise from a public health emergency or from a declared state of emergency.

- a. Without Objection by the Victim

A critical limitation to the Good Samaritan protections is that the injured victim(s) must not object to the care offered or provided. For example, a rescuer was not entitled to the protection of the statute when the injured person insisted that he not be moved and that the only thing he wanted was for an ambulance to be called, but the rescuer moved the victim anyway, allegedly causing injury thereby. Botte v. Pomeroy, 438 So.2d 544 (Fla. 4th DCA 1983), rev.den.450 So.2d 488.

RISK MANAGEMENT TIP: When circumstances permit, a person rendering aid should briefly describe their training or qualifications (e.g. "I'm a doctor." "I've taken the state First Responder course.") and obtain consent of the victim to whatever assistance is offered.

2. Emergencies in a hospital

- a. Emergency screening, diagnosis and treatment

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Florida law also protects hospitals and providers who are providing emergency care to patients pursuant to the Federal (EMTALA) and state laws that require hospital emergency departments to provide screening and stabilization of emergency conditions. This protection applies until the patient is stabilized and capable of receiving medical treatment as a non-emergency patient and, if the patient requires surgery within a reasonable time after being stabilized, the protection lasts until the patient is stabilized following the surgery.

b. Voluntary response by physician

In addition, if a health care practitioner is in the hospital and voluntarily responds to provide care or treatment to a patient (not his or her own) who needs care due to "a sudden or unexpected situation or occurrence that demands immediate medical attention", the practitioner is protected for treatment related to the original situation that demanded the immediate medical attention.

3. Organized Emergency Response activities

Lastly, Florida provides some protection for any person who is not otherwise protected by the law, but who is participating in emergency response activities in connection with local emergency management, a community emergency response team, the Division of Emergency Management or FEMA.

What Protection Does Florida's Good Samaritan Act Provide?

The Good Samaritan Act provides its protection by setting a legal standard required to hold a "rescuer" liable. Rather confusingly, the Act provides different protections for each situation,



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as follows:



At the Scene of an Emergency

At the scene of an emergency (or otherwise not in a hospital or doctor's office), if a person behaves "as an ordinary reasonably prudent person would have acted under the same or similar circumstances" the statute provides protection. For a non-health care provider, there is **no** protection, because persons are only protected if they acted prudently—i.e., they were not negligent. No court has interpreted the Act's language in terms of the standard of care expected of a health care provider; however, given the purpose of the statute, a court should find that physicians and other trained providers are held to the standard of a layman's, not another professional. (Almost identical language is used for the protection provided to individuals participating in organized emergency response situations; therefore, the analysis is the same for that situation.)

2. Emergency Screening, Diagnosis etc.

When diagnosing or treating patients in the emergency room, health care providers are protected from suit unless their behavior demonstrates a "reckless disregard" of the consequences of the behavior. The statute then clarifies that "reckless disregard" is conduct that creates a risk of injury that is "*substantially greater*" than the level of risk that would have made the conduct negligent. Unfortunately, the suggested jury instructions for this provision, although directing the jury to consider "emergency circumstances", do not contain the clarification about needing more than negligence and a jury might interpret the instructions to mean negligence is enough for liability.

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3. In-hospital emergencies

When responding to an in-hospital emergency, a health care practitioner is protected unless their behavior amounted to conduct that was "willful and wanton and would likely result in injury." There are no cases interpreting this provision and no standard jury instructions have been drafted to see how it would be defined in practice.

What is the Practical Effect of Florida's Good Samaritan Act?

The astute reader of the summary of Florida's Good Samaritan Act will have noticed that it puts forth different standards for different situations. While the goal of the law was to protect "Good Samaritans" from lawsuits brought by the persons they were trying to assist or save, the Act itself is clearly the result of the legislative (or its close cousin, sausage-making) process. Again, lawsuits against Good Samaritans are quite rare. Nonetheless, although the act may lower the risk of an adverse *verdict* being levied against a "Good Samaritan" (whether or not a health care professional), what came out of the legislative process is not quite the effective shield against *being sued* that one could have hoped for.

The standards for protection set by Florida's Good Samaritan Act all depend on a determination of the reasonableness of the rescuer's behavior. Determinations of reasonableness are essentially always the province of the jury to decide. Thus, the Act does not pose any substantial bar to the filing or prosecution of a lawsuit.



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Are University of Florida Faculty Members and Residents Protected by Sovereign Immunity or the Self-Insurance Program When They Provide Services in an Emergency?

University of Florida employees are personally immune from being sued in the state of Florida for their actions taken as University employees. The Dean of the College of Medicine has recognized that faculty members may have ethical obligations as professionals to render assistance as Good Samaritans and has indicated he considers such actions as part of the faculty member's University role. Whether a court would agree that a faculty member should be personally immune for Good Samaritan activities is unknown. In any event, even if personal immunity from suit did not apply, the University's Self-Insurance Program provides personal coverage to faculty members who act as Good Samaritans or who engage in community service that has been pre-approved by the Dean, Vice President for Health Affairs or Shands Hospital CEO.

Take Home Risk Management Message:

While individuals legitimately worry about being sued if they act as a Good Samaritan, as the law doesn't provide a lot of safety, claims by persons rescued are extremely rare. Fear of liability should not be the driving factor in an individual deciding whether or not to get involved in providing emergency services.



To review the text of the law click on the following link and look under Chapter 768.13:<http://www.flsenate.gov/Statutes/index.cfm>

Amendment 7 Update

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As you will recall, in the general election of November 2, 2004, Florida voters overwhelmingly approved a constitutional amendment entitled "Patients' Right to Know about Adverse Medical Incidents," commonly known as "Amendment 7."

Amendment 7 provides that "patients" have a right of access to "records of adverse medical incidents." Prior to the election, proponents of Amendment 7 publicized it as providing patients with the ability to obtain information to make better-informed choices among health care providers. Immediately following the election, plaintiffs' attorneys began using Amendment 7 as a basis for document discovery requests in pending litigation, claiming that the Amendment nullified the longstanding privileges that protected peer review, risk management, and quality assurance materials from use in litigation.

The Florida Hospital Association and Shands Health-Care filed a lawsuit (*Florida Hospital Ass'n, Inc., Shands Teaching Hosp. & Clinics, Inc. et al v. Florida Agency for Health Care Admin.*) asking the court to order that Amendment 7 could not be enforced without legislative implementation because it left too many questions unanswered. Without implementing legislation, hospitals could not be certain: which records must be provided to a patient; whether and how much the health care provider could charge for copies; how quickly a health care provider must respond; who qualifies as a "patient"; or how broadly to define "adverse medical incident." In December of 2004, the court determined that the case did not present a "justiciable controversy," stating that these issues would have to be raised in response to a specific request for documents.



At the same time, plaintiffs in medical malpractice cases across the state began asking courts to compel health care providers to turn over peer review, risk management, and quality assurance materials. In these cases, hospitals argued that the Amendment could not be enforced until the legislature clarified its terms; that the Amendment did not nullify the protections against discovery and admissibility of the records it addressed; and that the Amendment did not apply to records created before November 2, 2004. The majority of the courts that addressed these matters ruled in favor of the hospitals, finding that the Amendment was neither self-executing nor retroactive.

While the decision in the *Florida Hospital Association* case was pending appeal, a bill, which was supported by FHA and Shands among others, was introduced in the Florida Senate to implement and clarify Amendment 7. Both the Senate and the House approved SB 938, now found at section 38 1.028 of the Florida Statutes, with only 2 senators and 3 representatives voting against it. This legislation provides, among other things: that only final reports of adverse medical incidents are subject to disclosure; that such documents are not subject to discovery or admissibility in civil or administrative actions; that the person requesting documents must show that he or she has been a patient of, or has an impending patient relationship with, the provider from whom records are sought; that the patients have the right to access only those documents pertaining to adverse incidents involving substantially the same condition or treatment as that sought by the requesting patient; that the health care provider must identify records of adverse medical incidents using the criteria for reporting a Code 15; that the health care provider can charge a fee for the staff time necessary to respond to the request as well as for copies of records; and that the Amendment is not retroactive.

Once section 381.028 became effective, health care providers cited this statute to prevent plaintiffs from obtaining peer review, risk management, and qual-

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ity assurance materials in litigation. As anticipated, plaintiffs challenged the constitutionality of the legislation. Two Courts of Appeal ruled on this issue in March of this year. Both Appellate Courts held that the statute was unconstitutional in its entirety because, the courts found, the statute attempted to limit the constitutional right created by Amendment 7. One of these courts, in the case of *Florida Hospital Waterman, Inc. v. Buster*, found that the Amendment applied only to documents made after the effective date of the Amendment. The other court, in the case of *Notami Hospital of Florida, Inc. v. Bowen*, found that the Amendment applied to *all* records of adverse medical incidents without regard to the date they were created. These cases are currently before the Florida Supreme Court, but oral arguments have not yet been scheduled. In pending malpractice litigation, Shands and other hospitals have requested that courts delay consideration of issues concerning Amendment 7 discovery requests until the Supreme Court has ruled on the *Bowen* and *Buster* cases. Most courts have granted these requests.

In the *Bowen* and *Buster* cases, the Florida Supreme Court will consider whether the implementing legislation supplements and clarifies the right created by Amendment 7. If the Supreme Court finds that any provisions of the legislation conflict with (rather than clarify) the terms of the Amendment, the Court may, nonetheless, uphold the constitutionality of the non-conflicting provisions. The Supreme Court will also consider whether Amendment 7 provides a right to access records that were created before November 2, 2004, when the Florida Statutes unambiguously guaranteed the confidentiality of peer review, risk management, and quality assurance records. If the Supreme Court upholds the constitutionality of section 381.028, or parts thereof, interpretation of specific provisions will likely be further litigated in courts around the state. If the Supreme Court strikes the entire statute as unconstitutional, that decision will not preclude legislature from enacting a statute that conforms to the Court's opinion.



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While the future of section 381.028 remains uncertain, important legal protections remain intact for participants in peer review. These include the following:

- ***Attorney-client communications continue to be privileged.***
- ***Nothing in Amendment 7 requires that the names of the reviewers must be revealed in the records disclosed under the Amendment.***
- ***Health care providers continue to be immune from liability for participation in peer review activities.***
- ***Participants in peer review cannot be compelled in civil or administrative proceedings to testify concerning those activities.***
- ***Because peer review committees conduct their activities on behalf of the hospital, hospitals will provide the defense for claims against medical staff members arising out of their participation in peer review activities.***

Whatever the outcome of the *Bowen* and *Buster* cases, Florida statutes, Federal law and JCAHO standards continue to require hospitals to conduct peer review, as well as other quality improvement and assurance processes, in order to maintain and improve patient safety. Failure to comply with these requirements has its own consequences, including lawsuits based on claims of negligent credentialing by medical staff and the hospital.

Shands medical staff and quality departments have

undertaken to improve peer review forms and processes so that the hospital, through its medical staff, continues to conduct effective peer review, while at the same time minimizing the potentially negative impact of documents that may be viewed out of context.



2007 National Patient Safety Goals:

1. Improve the accuracy of patient identification.
2. Improve the effectiveness of communication among caregivers
3. Improve the safety of using medications
4. Reduce the risk of health care associated infection.
5. Accurately and completely reconcile medication across the continuum of care.
6. Reduce the risk of patient harm resulting from falls.
7. Encourage patients' active involvement in their own care as a patient safety strategy.
8. The organization identifies safety risks inherent in its patient population.

For more detailed information relating to the 2007 National Patient Safety Goals log on to: <http://www.jointcommission.org/PatientSafety/NationalPatientSafetyGoals/> and click on hospital.



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