

## Amendment 8 will hurt, doctors say

### Legal battle brews in Leon County

[Andi Atwater](#)

Staff

aatwater@news-press.com

Amendment 8, better known as the "three strikes, you're out" constitutional law passed by voters Nov. 2, will do far more harm to residents' access to health care services than it will to the medical community, Southwest Florida doctors said.

That's because doctors will simply pack up and leave before they gamble with their medical licenses, many physicians said.

"Call it the 'two strikes, we're gone' amendment," Fort Myers pediatric otolaryngologist Dr. John Donaldson said.

The somewhat ambiguous Amendment 8, which calls for the revocation of a doctor's medical license if he or she has been found to have committed malpractice three times in Florida or other states, now is being challenged in Leon County Circuit Court.

The Florida Hospital Association, a trade organization representing more than 200 hospital systems, is leading the legal battle to send

Amendment 8 back to legislators in March to clarify the rules.

Attorneys and supporters of the amendment say the outcry from physicians is nothing more than scare tactics and that the new law, at the very least, will bring to the table important discussions on how to weed out truly bad doctors who still practice in Florida.

"The Board of Health is utterly feckless when it comes to disciplining doctors," said Lee County judicial attorney Steven Hooper, whose career has included defending physicians in malpractice lawsuits. "It goes back to a very fundamental notion: When doctors stop committing malpractice, lawyers will stop suing them."

The amendment, called "Public Protection from Repeated Medical Malpractice," was overwhelmingly passed by voters, including 72 percent of Lee County voters.

But health care providers here say the amendment has far-reaching repercussions for patient care and the recruitment of doctors in a state many consider already a hostile environment because of malpractice liability premiums.

Important subspecialists, such as orthopedic surgeons, will stop taking turns treating trauma and emergency room patients because the risk of lawsuits is too high, said Dr. Andrew Mikulaschek, Lee Memorial Health System's trauma director.

"(It) will have a chilling effect in this state and directly impact the most fragile components of medical care, which happens to be the trauma centers," he said. "There are so many subspecialties that have to be involved in order to comply with regulatory standards and if you lost just one of those, you fall out of compliance and have to give up your **trauma center** designation.

"Nobody's going to stick around and wait for a third strike."

Amendment 8 - as well as Amendment 7, which opens up physician review records to the public - was created by Floridians for Patient Protection, a committee formed by the Florida Academy of Trial Lawyers to counter the successful Amendment 3, which limits the amount of money an attorney can reap from a successful medical liability case.

In fact, at one point before the election, the trial lawyer's group offered to take amendments 7 and 8 off the ballot if the Florida Medical Association killed Amendment 3. Neither side backed down.

What all this constitutional wrangling has done is create a legal quagmire of pending lawsuits and injunctions when all

voters wanted was to weed out bad doctors, residents said.

"Bad medicine is bad medicine," said Fort Myers resident Donald Davis, 78, who voted for Amendment 8. "If the system were set up so that we had an honest-to-goodness qualified body - some physicians, some scientists, perhaps people in the academic field - who really understood medicine ... if you take everything into consideration ... then I don't think a doctor ought to make more than three mistakes."

But physicians say what constitutes three malpractice strikes in Amendment 8 and what happens in real life are two different things.

For example, the amendment does not count out-of-court settlements as a strike - no matter how large the settlement or how egregious the error - but it would count a small judgment found in court.

Strikes also would include any discipline by the Florida Board of Medicine and binding arbitration.

In essence, if it goes as written, opponents say the law will force most physicians to settle every lawsuit, regardless of merit, rather than risk a bad outcome in court.

There is also the question of exactly how far the law would reach into a doctor's history.

Lee County plastic surgeon Dr. John Bruno said he was involved with two malpractice actions 27 years ago that went to court and were found to have little merit, although Bruno said he agreed to settle or pay a fine of \$1,000 or less for each just to be done with them.

Those cases, nearly three decades old, could certainly count against him today if Amendment 8 passes as is, Bruno said.

"Is this proposal really preventing bad doctors from staying in the system? No," Bruno said. "Say I'm a complete idiot and I operate on somebody and obviously commit malpractice. If I settle, it won't count. Those guys will jump at a settlement to save their license ... and they continue to practice, money in pocket."

Attorneys who handle medical malpractice cases argue it is not as simple as that.

A malpractice lawsuit requires an immense amount of money, time and research before it even reaches trial status.

When it does, there is usually a solid reason for it, Fort Myers trial attorney Michael Beckman said.

"In Florida, it's practically impossible to have a frivolous lawsuit against a doctor," he said. "There are rules to make sure there are no bad lawsuits - but shouldn't there be rules to make sure there are no bad doctors?"

In the end, supporters say, Amendment 8 could ensure better patient care by forcing out bad doctors and subsequently lowering malpractice insurance premiums for the remaining good doctors who presumably won't get sued.

But physicians are far from convinced.

Last week, the Lee County Medical Society board discussed formally advising all its members to get their medical licenses in another state for backup.

That idea didn't fly for legal concerns, but society president and facial plastic surgeon Dr. Douglas Stevens said the sentiment still stands.

"I'm going to do that. I'm going to activate my license where I came from in Maryland," he said. "I don't have any intentions of leaving, but want that option in case it comes to that. Many doctors are doing that."

Some physicians, particularly those in high-risk specialties such as obstetrics, neurology and cardiology, may stop treating certain patients.

"You're going to see physicians tailor their practices to eliminate high-risk patients," anesthesiologist Dr. Charlie Brown said. "Ultimately, it's going to make it harder to find a doctor and get the help they need."

## AMENDMENT 8

Amendment 8, or the "Public Protection from Repeated Medical Malpractice" law, was approved by voters Nov. 2.

The amendment says, in part, that "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."

The Florida Hospital Association, Adventist Health System/Sunbelt Inc. and Florida Hospital, Orlando, chief of staff Dr. Joseph Portoghese filed a lawsuit in Leon County seeking an injunction against the amendment and requesting the court send it back to legislators to clarify and define. A hearing is scheduled Monday.

The lawsuit says physicians are "in doubt" as to their rights. The complaint outlines several ambiguities:

Which health care providers should be considered "medical doctors" and thus subject to Amendment 8.

Whether judgments or discipline against a doctor prior to the passage of Amendment 8 count as strikes - as well as judgments made after the law is passed in earlier cases.

Are doctors' constitutional rights to equal protection violated because some doctors will be treated differently depending on how they resolve claims (i.e., settle vs. going to trial)?

How will adverse judgments in other jurisdictions be converted to be judicially equivalent to Florida standards?

Does a civil judgment count as a strike, particularly since the standards of proof are different?