IN THE SUPREME COURT OF FLORIDA
Case No. SC04-777

Upon Request From The Attorney General
For An Advisory Opinion As To The
Validity Of An Initiative Petition

ADVISORY OPINION TO
THE ATTORNEY GENERAL

RE: PATIENTS' RIGHT TO KNOW
ABOUT ADVERSE MEDICAL INCIDENTS
CONSTITUTIONAL AMENDMENT

ANSWER BRIEF OF THE FLORIDA DENTAL ASSOCIATION

IN OPPOSITION TO THE INITIATIVE

Graham H. Nichol
Fla. Bar No. 714976
General Counsel
Don A. Dennis
Fla. Bar No. 0146498
Associate General Counsel
Florida Dental Association
1111 E. Tennessee Street
Tallahassee, Florida
Telephone: (850) 681-3629
Facsimile: (850) 561-0504

Harold R. Mardenborough, Jr.
Fla. Bar. No. 947172
McFarlain & Cassedy, P.A.
305 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 222-2107
Facsimile: (850) 222-8475

Attorneys for Opponent,
Florida Dental Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARGUMENT

1. The Proposed Amendment Confuses Voters By Failing To Provide Them With Necessary Information About The Scope Of The Amendment And Its Impact On The Judiciary.

A review of the Initial Brief of the Floridians for Patient Protection makes clear that most people will consider it to be aimed at making disciplinary information public accessible. The Brief describes that most malpractice is committed by few doctors. FPP Initial Brief, p. 2. It argues that public knowledge of which doctors "have significant histories of adverse medical incidents" would allow for more informed choices. *Id*. at 3. It derides the current system for providing such information. *Id.* It bemoans the alleged inadequacy of Florida practitioner database information. *Id.* at 3-6. It argues that the "Patient's Bill of Rights" is flawed because it does not truly provide for all of the information about their physicians be made available. *Id.* at 6-7.

In this regard, it claims there are only minor impacts on governmental functions because the FPP ignores the impact this amendment has on the peer review process and the judicially governed work product doctrine. This Court should not ignore that impact. Likewise, the suggestion that the proposed amendment would not impact other sections of the constitution is incorrect. While the sponsor may have taken steps to protect

constitutional privacy rights, it failed to account for the impact the amendment will have on this Court's power to regulate the Bar.

The focus on disciplinary information in the FPP Initial Brief illustrates just how misleading the Title and Summary are in this case. There are two fundamentally distinct areas which this type of amendment could be directed. First, it could be directed at disciplinary information. Patients, and patient advocates, can argue that this information should be public so patients can make good decisions about which doctors they want to see. Second, it could be directed at an area of "adverse medical incidents" which do not involve any negligence or malpractice. It could be directed a that very class of cases where physicians conduct frank, serious, self-criticism in order to practice medicine even better.

The problem with this Amendment is that the actual Amendment clearly includes both of these areas, while the Title, Summary, and even the self-described purpose in the FPP Initial Brief is directed at only one of those areas. The packaging of the Amendment suggests this is all about making disciplinary information public; the actual Amendment is about making everything up to and including peer review materials public.

The sponsors suggest the summary is "an accurate statement

both of the constitutional and statutory exemption from disclosure described above, and of the actual ability of patients to obtain this information, for example, as noted above, from a practitioner's 'profile'." *Id.* at 23-24. However, the ballot Title and Summary exclude any mention at all of the significant protections which will be removed, such as the peer review privilege, the work product privilege or the attorney-client privilege. Each of these is an extremely significant protection, and each of them will be lost if this Amendment is passed. While the public may have the right to vote away those protections, they must be told this is what they are doing. Indeed, the failure to let the voters know of the impact on these several privileges contradicts the sponsor's claim that the Amendment has no effect beyond those described in the Title and Summary. The Title and Summary do not disclose, in any way or fashion, the repeal of the peer review protections, the likelihood that peer review requirements may simply be removed as a result of this Amendment, or the de facto creation of the "adverse medical incident" exception to the work product and attorney-client privileges.

2. The Proposed Amendment Violates The No-Logrolling Rule Because It Requires Voters To Adopt Or Reject An Broad Range Of Changes Related To Adverse Medical Incidents.

In considering the arguments in response to the FPP Initial

Brief, the FDA noted there is a "log-rolling" violation in this Amendment it had not noted before filing the Initial Brief. While the Amendment is designed to do one thing, provide access to records on "adverse medical incidents," it does so by repealing several different statutes with different purposes, and by restricting a number of different rights available to physicians which are also available to all other Floridians. These should be presented to the voters in a fashion which allows them to reject any portions with which they do not agree.

For example, voters may believe that access to discipline profiles is a good idea, but want to retain the public benefits of the peer review process by permitting its continued privilege. Likewise, voters could want access to discipline profiles, but think that protection of the work product and attorney-client privileges should be maintained. Indeed, there may be thousands of Florida physicians who think some more information should be available, but do not want to have to waive statutory peer review and personal work product and attorney-client privileges. Voters should not be forced to "accept part of an initiative proposal which they oppose in order to obtain a change in the constitution they support." *Fine v. Firestone*, 448 So.2d 984, 988 (Fla. 1984). This initiative

forces them to do just that, assuming they even understand the logical impact the plain language of the amendment will have on them.

CONCLUSION

Accordingly, this Opponent, Florida Dental Association, requests that this Court find that the ballot initiative is defective and to inform the Attorney General that it may not be placed on the 2004 ballot.

CERTIFICATE OF COMPLIANCE RE: TYPEFACE

I HEREBY CERTIFY that the type style and size used in this Initial Brief is 12-point Courier New, proportionally spaced, as required by Florida Rule of Appellate Procedure 9.210(a)(2).

_____
Harold R. Mardenborough, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Initial Brief was served by U.S. Mail on this 1st day of June, 2004 to the following list of counsel.

The Honorable Jeb Bush
Governor, State of Florida
The Capitol
400 South Monroe Street
Tallahassee, FL 32399-0001

The Honorable Johnnie Byrd
Speaker of the House
The Capitol, Suite 420
402 South Monroe Street
Tallahassee, FL 32399-1300

The Honorable Glenda Hood
Secretary of State
Florida Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399-0250

Barnaby W. Zall
Weinberg & Jacobs, P.A.
11300 Rockville Pike# 1200
Rockville, MD 20852
Attorneys for Floridians for Patient Protection

The Honorable Charlie Crist
Attorney General of Florida
The Capitol, PL-01
400 South Monroe Street
Tallahassee, FL 32399-0001

Jon Mills
Timothy McLendon
P.O. Box 2099
Gainesville, Florida 32602
Attorneys for Floridians for Patient Protection

The Honorable James King
President of the Senate
The Capitol, Suite 409
404 South Monroe Street
Tallahassee, FL 32399-1100

_____
Harold R. Mardenborough, Jr.