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

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Upon Request from the Attorney General
for an Advisory Opinion as to the
Validity of an Initiative Petition

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# ADVISORY OPINION TO THE ATTORNEY GENERAL

RE: PATIENTS' RIGHT TO KNOW
ABOUT ADVERSE MEDICAL INCIDENTS

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# ANSWER BRIEF OF SPONSOR FLORIDIANS FOR PATIENT PROTECTION

IN SUPPORT OF THE INITIATIVE

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## SUMMARY OF ARGUMENT

The title and summary of the proposed Right to Know amendment accurately describe the narrow impact and chief purpose of the proposal: to protect individuals from medical malpractice by allowing potential patients to determine whether a practitioner has a history of adverse medical incidents. The proposed amendment changes a policy that has failed to achieve its intended results. The people may choose to protect themselves, rather than relying on practitioners acting in secret. This is a legislative function, within the power of the people.

Opponents suggest that the proposed initiative will also affect judicial functions. There will be no such effect, however, since the proposed amendment is simply a precise and clear elimination of a legislative exemption from otherwise applicable constitutional public disclosure rules. None of the asserted complaints demonstrate a substantial impact on the judicial branch:

- *Effect on Health Care "Work Product" Privilege:* To the extent that the Court has recognized a "work product" exception for peer review and similar materials, that was a recognition of the statutory basis for the exception. Elimination of such a privilege does not usurp judicial functions.

- *Elimination of Attorney-Client Privilege:* This Court has long recognized that the attorney-client privilege prevails over public disclosure requirements. That privilege will remain after passage of this amendment.

- *Affecting the Court's Regulation of the Florida Bar By Causing Attorneys to Violate the Ethical Rules When Their Health Care Provider Clients Disclose Privileged Materials:* Similarly, opponents' concerns that attorneys will

violate ethical rules if their clients reveal information sent to them by their attorneys is based on a misunderstanding of the ethics rules.

There will be no alteration or effect on the judiciary, much less a substantial usurpation of judicial functions. The proposed amendment has but one subject.

Opponents also contend that the proposed ballot title and summary are inaccurate and misleading. None of these assertions are valid:

*Whether The Title and Summary Should Disclose That The Legislature Might Decide to Repeal Mandatory Peer Review:* Opponents want the title and summary to reveal that the Legislature might repeal mandatory peer review laws. This Court has never required the title or summary to include hypothetical effects; titles and summaries are to describe the "chief purpose" of a proposal.

*Whether the Title And Summary Should Disclose A Non-Existent Effect on the Judiciary:* Opponents argue that the title and summary must describe predicted effects on the judiciary. But no such effects exist, so they need not be disclosed.

*Whether the Examples of "Adverse Medical Incident," Though True, Are Superfluous Rhetoric:* Opponents contend that the explanations of "adverse medical incidents" as "including medical malpractice" are true, but superfluous rhetoric. This Court, however, should permit non-misleading and clear explanations of technical, uncommon terms defined in the proposed amendment.

*Whether the Summary Accurately States Current Law:* Opponents contend

that the summary inaccurately describes current law restricting information available to patients; they suggest that this information is available in litigation. Opponents, however, look solely from the perspective of injured patients seeking redress, while the proposed initiative is much broader, seeking, *inter alia*, to help potential patients avoid adverse incidents by making available information not currently disclosed. The summary's description is accurate and not misleading.

*Whether the Summary Is Misleading Because It Says That Patient Identities "Should" Not Be Disclosed Where the Actual Text Says That They "Shall" Not Be Disclosed:* Opponents claim that the use of the word "should" in the summary while the text uses the word "shall" means that some medical professionals might mistakenly vote in favor of the proposal because they erroneously believe that they would be allowed to disclose patient identities to other patients in "extreme cases." "Should" and "shall," as used in this context, are identical, and the disclosure which apparently concerns opponents is likely prohibited by federal law.

The proposed initiative has a "logical oneness of purpose," contains only one subject and its ballot title and summary are both accurate and not misleading. The initiative should be permitted to advance to the ballot.

## ARGUMENT

### I. THE PROPOSED AMENDMENT DOES NOT VIOLATE THE SINGLE-SUBJECT REQUIREMENT BECAUSE IT DOES NOT USURP THE FUNCTIONS OF MULTIPLE BRANCHES OF GOVERNMENT.

Opponents of the proposed initiative do not suggest that the proposed amendment involves "logrolling" – the combining of disparate subjects into a single initiative so voters would be forced to accept an part which they oppose in order to obtain a change that they support. *See* Initial Brief of the Florida Dental Association ("Dentists' Br.") at 5, 6 n.2 (citing *Fine v. Firestone,* 448 So. 2d 984, 988 (Fla. 1984)). As the proponents discussed in their initial brief, the proposed Right to Know amendment does not combine disparate subjects and does not constitute "logrolling." *See* Initial Brief of Floridians for Patient Protection ("FPP Br.") at 19-21.

Nor do the opponents suggest that the proposed amendment lacks a "logical oneness of purpose." Dentists' Br. at 6 (citing *Fine,* 448 So. 2d at 990). As the proponents demonstrated in their initial brief, every part of the proposed initiative is directly connected to a single dominant plan – to provide Floridians with information about health care providers' adverse medical incidents which is now kept secret from them. *See* FPP Br. at 19-21.

Nevertheless, the opponents of the proposed initiative suggest that the

proposed amendment violates the single subject prohibition because "the amendment substantially impacts several different governmental functions." Dentists' Br. at 3. The opponents suggest two such "impacts," on the following branches:

- On the legislative branch because the proposed initiative "would repeal an entire area of statutory law which provides that peer review materials are not discoverable," *id.*; and
- On the judiciary because the proposed initiative "effectively overrules over 50 years of common law with respect to discovery, as well as procedural rules . . . by eliminating the work product privilege for providers and facilities", *id.*, by "effectively repeal[ing] Section 90.502, Florida Statutes", *id.*, and by "substantially compromis[ing] this Court's exclusive constitutional obligation to regulate the Florida Bar because lawyers would be violating the Bar rules by simply sending materials to their clients." *Id.* at 3-4.

Neither of these objections withstands scrutiny.

### A. The Proposed Initiative Has an Insubstantial Effect on the Legislative Branch.

In their initial brief, the sponsors of this initiative described their proposal: "Information about most adverse medical incidents is currently collected by the

Department of Health, and to some degree the Department of Insurance Regulation, but some of this information is currently exempt from public disclosure, even in discovery or legal actions. The proposed amendment will remove that exemption. This is a single, legislative function." FPP Br. at 9.

Opponents recognize this specific purpose and effect of the proposed amendment:

> In other words, the legislature has exercised its constitutionally granted power to make limited exceptions to the public records laws to guaranty [*sic*] peer reviews can be performed in private. The legislature has engaged in a careful balance between the need for providers and facilities to engage in self-criticism without having that information shared with others against the desire of the public to have access to such information. . . . . It is undisputed that the adverse medical incident amendment would overrule the legislature's policy making function in this area.

Dentists' Br. at 8 (footnote omitted).

Though the amendment, as discussed in the proponents' initial brief, covers many more provisions related to inadequate disclosure of adverse medical incidents, *see*, FPP Br. at 3-7, the opponents' description of this small area is somewhat accurate, although incomplete.

- The Legislature requires health care providers and facilities to engage in continual "peer review" procedures to protect the public health. § 395.0193, Fla. Stat. (2003). An express purpose of this provision is

protecting the participants from tort and anti-trust exposure:

> It is the intent of the Legislature that good faith participants in the process of investigating and disciplining physicians pursuant to the state-mandated peer review process shall, in addition to receiving immunity from retaliatory tort suits pursuant to § 456.073(12), be protected from federal antitrust suits filed under the Sherman Anti-Trust Act, 15 U.S.C.A. §§ 1 *et seq*.

§ 395.0193(1), Fla. Stat. (2003).

- Any disciplinary actions taken pursuant to this law must be reported to the state Department of Health. § 395.0193(4), Fla. Stat. (2003).
- Participants are protected from any monetary loss or liability arising from their participation in these proceedings. § 395.0193(5), Fla. Stat. (2003). No cause of action arises because of these proceedings. *Id*. There is an exception for intentional fraud. *Id*.
- Ordinarily such reports would be available for public access under constitutional and statutory disclosure authority. Art. I, § 24, Fla. Const. The Legislature may, by specific procedures, exempt certain materials from disclosure. Art. I, § 24(c), Fla. Const.
- The Legislature has so exempted these "peer review" proceedings from public disclosure. Proceedings and records under that law are not subject to public disclosure and "are not open to the public" under regular disclosure procedures. § 395.0193(7), Fla. Stat. (2003).

- Nor are such proceedings discoverable or useable as evidence for any purpose in litigation against a participating health care provider. § 395.0193(8). Persons who participated in such a peer review proceeding may not be called as witnesses. *Id*.
- The proposed amendment is intended to, and likely will, remove the exemption from public disclosure from these peer review disciplinary reports, as well as some other previously-unreported records of adverse medical incidents. *See* FPP Br. at 9.

In other words, as the opponents indicate, the Legislature has carefully balanced interests involved in the peer review process and made a choice about what should be disclosed to the public. It has that power under the Constitution. Art. I, § 24(c). Now, the people of Florida will decide, as a policy matter, if they support that choice. This is a single legislative function, properly addressed through the initiative process.

This will not involve any "precipitous" and "cataclysmic" changes to the Constitution which the single subject limitation is intended to forestall. *See Advisory Opinion to the Att'y Gen'l re: Voluntary Universal Pre-Kindergarten Educ*., 824 So. 2d 161, 164 (Fla. 2002). Rather, this proposal is a simple and precise change in a legislative policy. The people have this right to oversee and

correct their Legislature when they disagree with its careful balancing of interests. That is the fundamental purpose of the initiative process, and does not violate the single subject rule.

The elemental flaw in the opponents' reasoning, however, is that they focus essentially solely on the situation of a patient who has already been injured and wishes redress. Thus, opponents claim that an injured patient in litigation could obtain some of the information about their own and other adverse medical incidents. *Cf.* Dentists' Br. at 23.

That is viewing the initiative too narrowly. The central purpose of the proposed initiative is prevention of adverse medical incidents – ironically the same purpose offered by the opponents for retaining the peer review system. *See* Dentists' Br. at 8, 15. The proposed amendment offers possible prevention of incidents by allowing potential patients to determine whether the provider they are about to choose to treat them has a history of adverse medical incidents. That information is not available under current law. This amendment would make that information available.

Opponents do not even address the prevention aspect of the proposed amendment, even though it would obviously go to the question they assert as central: whether voters should make the legislative and policy trade-offs inherent

in an amendment which would make public the previously-secret peer review processes. *See* Dentists' Br. at 15. The opponents are defending a peer review system as making patients safer by keeping information from them; however, given the sorry state of practitioner disclosure and discipline in Florida, *cf.* FPP Br. at 2-7,[1] voters may want to do it themselves by learning about practitioners' adverse medical incidents and avoiding those practitioners with significant histories of adverse incidents.

This choice to use disclosure instead of secret proceedings is a legislative function, reserved to the people.

**B. The Proposed Initiative Does Not Affect the Judiciary.**

Opponents, however, also contend that the proposed amendment will usurp the function of the judiciary "by restricting the Rules of Civil Procedure and by

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[1] For more information on physicians who have committed repeated medical malpractice but have not been disciplined in Florida, *see, e.g*, Public Citizen, *Florida's Real Malpractice Problem: Bad Doctors & Ins. Cos. Not the Legal Sys.* (Sept. 2002), at 8-9, *available online at*: http://www.citizen.org/documents/FLAreport.pdf (showing that doctors with as many as 18 instances of malpractice over twelve years have been allowed to continue practicing in Florida); Florida Dept. of Health, Div. of Medical Quality Assurance, *Annual Report to the Fla. Legislature, Appendices, Table 9: Performance Statistics for Med. Malpractice Claims* (2003), *available online at*: http://www.doh.state.fl.us/mqa/Publications/02-03appendices.pdf (reporting that, of 107 investigations by the Department of Health against physicians with three or more malpractice claims, disciplinary proceedings occurred in only three of these cases).

effectively overruling years of common law on discovery." Dentists' Br., at 9. They offer three examples of this concern, none of which are valid:

*1) Opponents Are Mistaken About the Nature of Peer Review "Work Product" Privilege.*

The opponents first contend that "incident reports generated by providers and facilities constitute work product pursuant to this Court's Rules." Dentists' Br. at 9. This Court does recognize this type of "work product" protection, particularly in cases involving the "pre-suit" requirements for medical malpractice claims, but notes that its basis is statutory. *See Cohen v. Dauphinee*, 739 So. 2d 68, 70-71 (Fla. 1999) (discussing legislative history of work product protection for pre-suit investigation materials developed under Section 766.106, Florida Statutes).

Because this type of "work product" privilege is substantive and statutory in nature, its reversal is a legislative, not a judicial function. There is thus no usurpation of any judicial function.

*2) Opponents Are Mistaken About the Effect of the Proposed Amendment on Attorney-Client Privilege.*

Opponents then contend that the proposed amendment "will substantially restrict the attorney-client privilege." Dentists' Br. at 10. Opponents correctly note that the Legislature has codified the lawyer-client privilege in Section 90.502, Florida Statutes, and suggest that "[t]his statutory protection will not stand in the

face of the proposed amendment, which requires the disclosure of any records received by the facility or provider which involve an adverse medical incident." Dentists' Br. at 10.

This assertion is the reverse of the prior claim: the attorney-client privilege existed long before the enactment of Section 90.502. *See, e.g., U.S. v. Louisville & Nashville R. R.*, 236 U.S. 318, 336 (1915). The privilege has been applied in ways not expressly discussed in the Florida statute. *See, e.g., Southern Bell Telephone & Telegraph Co. v. Deason*, 632 So. 2d 1377, 1382 (Fla. 1994) (discussing how elements necessary for privilege apply to corporation). Being regulated by the state does not vitiate the attorney-client privilege. *Id.* ("Southern Bell's status as a regulated company does not entitle the regulating body to unfettered access to Southern Bell's confidential communications.").

The proposed amendment will not provide any more intrusion into the attorney-client privilege than does existing disclosure law. Under existing law, even though records regarding adverse medical incidents must be made available, *see, e.g.*, § 395.0193, Fla. Stat. (2003), materials protected by the attorney-client privilege are "exempt from disclosure." *Davis v. Sarasota County Pub. Hosp. Bd.*, 480 So. 2d 203, 205 (2d DCA 1985), *review denied*, 488 So. 2d 829 (Fla. 1986).

Given the care with which this Court has protected and applied the attorney-

client privilege, it is unlikely that the proposed initiative will affect the attorney-client privilege at all, much less usurp the function of the judicial branch in applying and determining the scope of the privilege.

*3) The Opponents Are Similarly Mistaken About the Effect on Lawyers' Ethics Rules.*

Opponents then parlay their mistaken attorney-client privilege analysis into an assertion that this Court will be substantially affected because attorneys will have to disclose privileged information, in violation of Rule 4-1.6 of the Rules Regulating the Florida Bar. *See* Dentists' Br., at 11 ("the proposed amendment will trump this Court's Rule on attorney conduct in cases where the lawyer sends materials to a provider or facility client."), 3-4 ("would substantially compromise this Court's exclusive constitutional obligation to regulate the Florida Bar because lawyers would be violating the Bar rules by simply sending materials to their clients.").

Leaving aside the fact that the attorney-client privilege will be respected, as described above, this assertion reveals an odd understanding of the ethics Rules. An attorney who sends materials to a client does not violate Rule 4-1.6 if the client voluntarily or involuntarily later discloses the communication. The privilege is the client's. § 90.502(2), Fla. Stat. (2003).

Because there is no effect, much less a substantial effect, on the judiciary

from the proposed amendment, the initiative does not violate the single subject prohibition. It should be permitted on the ballot.

## II. THE PROPOSED BALLOT TITLE AND SUMMARY ARE ACCURATE AND NOT MISLEADING.

Opponents assert that the proposed ballot title and summary do not comply with the requirements of Section 101.061, Florida Statutes, because they:

> fail to fully inform the voters of the practical impact of this amendment on the existing peer review scheme. . . . Second, the Summary fails to inform the public of the significant impact it will have on the constitutional powers granted to the judiciary. Third, the Title and Summary contain improper political rhetoric. Fourth, the Title and Summary are misleading because they suggest [*sic*] to be giving the public more than they give, and by implying there are no current methods for obtaining any information on adverse medical incidents. Finally, important language in the Summary is inconsistent with the language in the amendment itself.

Dentist's Br. at 4. None of these assertions are correct.

### A. The Ballot Title and Summary Need Not Describe the Impact on the Peer Review Process, Because the Asserted Effect Is Speculative and Would Entail Independent Repeal of Existing Law By the Legislature.

The opponents suggest that, "The proposed amendment here proposes to give the voters access to information on adverse medical incidents, but fails to tell the voters what they might be giving up in order to get that access." Dentists' Br. at 15. The opponents clarify that what they believe will be "giv[en] up" will be: "there is every likelihood that making peer review materials subject to public

disclosure may very well result in an abandonment of the entire scheme." *Id*.

It is difficult to figure out exactly how opponents believe this process will take place. They note in a footnote that "the reality is that the amendment in this case would result in the repeal of peer review statutes and the lack of any records of adverse medical incidents being maintained at all." Dentists' Br. at 16 n.3. In other words, the phrase "may very well result in an abandonment" actually means that somehow the Legislature will repeal the statutory mandate for peer review. The proposed amendment does not require any repeal of this mandate.

Opponents themselves recognize that "this might not occur, but it is a very real possibility." Dentists' Br. at 16. They therefore ask that the ballot title and summary describe to the voters this possibility.

Describing possibilities and likelihoods is not a requirement in the ballot title and summary statutes. The statute requires only the description of the "chief purpose" of the initiative. § 101.161, Fla. Stat. (2003). The Court, recognizing the statutory word limits, does not require the ballot summary and title to detail every possible aspect of the proposed initiative. *See Advisory Opinion to the Atty. Gen'l re Protect People From the Hazards of Second-Hand Smoke*, 814 So. 2d 415, 419 (Fla. 2002); *Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982).

The opponents are seeking to protect the existing system of secrecy. *See*

Dentists' Br. at 17 ("the proponents seek to destroy a specific balance between peer review benefits and confidentiality"). The ballot title and summary informs the voters that there is an existing system which "restricts information available to patients related to investigations of adverse medical incidents, such as medical malpractice." Proposed ballot summary. The summary need not explain to the voters the reasons why this restriction was enacted.

The summary then explains that the proposed "amendment would give patients the right to review, upon request, records of health care facilities' or providers' adverse medical incidents." Proposed ballot summary. The summary need not explain to the voters each ramification of eliminating the restrictions on information. *Advisory Opinion to the Atty. Gen'l: English - The Official Language of Florida,* 520 So. 2d 11, 13 (Fla. 1988). This would be especially true if the ramification were speculative and would entail the Legislature independently deciding to repeal existing law. It would be impossible to satisfy this type of demand in a ballot summary of any length, much less the 75-word limit prescribed by statute.

The ballot title and summary need not discuss the effect on the peer review system. It discloses the existing system, and the change to be made. That is sufficient.

### B. The Ballot Title and Summary Need Not Inform The Voters That the Amendment Restricts The Power of This Court, Because It Does Not Do So.

Next, the opponents contend that the ballot title and summary are defective because they do not disclose that the proposed amendment will "substantially restrict[] the constitutional powers of the judiciary." Dentists' Br. at 20. These restrictions are described sketchily: "As described above, the amendment will at best restrict this Court's ability to make procural [*sic*] rules, and at worst it will restrict the Court's power to regulate the Florida Bar and to enforce the common law on attorney-client privilege." *Id*.

Yet, as described above, this amendment has essentially no effect on the judiciary. The opponents' concern about ethical Rules and the Bar, for example, is based on a misunderstanding about the Rules, as shown above (attorney does not violate the Rules when a client discloses information). This concern need not be disclosed to the voters, because it does not exist.

### C. The Ballot Title and Summary Do Not Contain Rhetoric.

Opponents then complain that the ballot title and summary, as proposed, contain inappropriate language amounting to "political rhetoric and commentary." Dentists' Br. at 20. The particular language complained of is apparently the clarification of the phrase "adverse medical incidents" by using the examples "such

as medical malpractice" and "including those which could cause injury or death." Dentists' Br. at 21.

Opponents do not maintain that the examples are inaccurate or misleading. Their complaint is simply that the language is "superfluous." Dentists' Br. at 21 ("These comments are not necessary to describe this amendment.").

Perhaps the opponents' concern might have some validity if a commonly-understood phrase were described using superfluous and disconnected terms simply for effect. But that is not the case here. As used in this initiative, "adverse medical incidents" is a sophisticated phrase, not previously defined in statutes[2] and not commonly used, which is defined in the text of the amendment. In similar situations, some prior initiatives have simply included a separate ambiguous phrase in the summary, reading "provides definitions." *See Protect People from the Hazards of Second-Hand Smoke*, 814 So.2d at 416; *Limited Marine Net Fishing*, 620 So.2d 997, 999 (Fla. 1993). The Court has upheld use of that phrase as advising the voter to look to the text of the amendment for clarification. *See Protect People from the Hazards of Second-Hand Smoke* , 814 So. 2d at 416.

Directing the voter to look at the text of an amendment, however, may not be

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[2] Numerous health care-related statutes use the term "incident" or the phrase "adverse incident." *See, e.g.*, §§ 395.0197(1)(a) ("adverse incidents to patients"), 641.55(1)(a) ("adverse incidents"), 400.0233(2) ("incident or incidents"). None seem to use the exact phrase "adverse medical incident."

the best or only approach. Ideally, voters should educate themselves prior to voting, *Smith v. American Airlines*, 606 So. 2d 618, 621 (Fla. 1992). However, not all voters read the actual text of proposed initiatives prior to entering the voting booth. A voter reading technical definitions in the voting booth would have little opportunity to stop, locate a copy of the full text, and determine whether to support the initiative. There would seem to be no reason why this Court should not also permit the use of clear and easily understood examples or explanations as part of the ballot summary.

These examples let the voters know what the phrase "adverse medical incident" means without having to look at the text of the amendment. They are accurate, easily understood and clear. Even as the terms "cruel" and "inhumane" were not rhetoric in explaining confinement of pregnant pigs, so also describing "adverse medical incident" as including "medical malpractice" is not rhetoric. *See Advisory Opinion to the Attorney General re Limiting Cruel & Inhumane Confinement of Pigs During Pregnancy*, 815 So. 2d 597 (Fla. 2002).

### D. The Ballot Title and Summary Are Not Misleading Even If They Do Not State That Some Information on Adverse Medical Incidents Is Available.

Opponents next suggest that the ballot summary is "misleading" because it "gives voters the impression that there is no way to get this information [about

adverse medical incidents]." Dentists' Br. at 21. The specific language complained of is the statement in the summary which reads: "Current Florida law restricts information available to patients related to investigations of adverse medical incidents. . . ." *Id*. The opponents concede, however, that "some information is restricted." Dentists' Br. at 23 ("Although some information is restricted, patients can get information in other ways.").

Opponents do not dispute the truth of the statement, only that it may give a false impression. *Id*. "[I]t is inaccurate to suggest in the Summary that no information is currently available." Dentists' Br. at 23.

Opponents similarly complain about a suggestion in the ballot title: "Likewise, the Title 'Patients' Right to Know About Adverse Medical Incidents,' suggests that patients currently have no right to 'know about adverse medical incidents.' But they do." Dentists' Br. at 23.

Opponents suggest that information is, in fact, available to a patient who looks for it. "If the information relates to their own incident, they can simply ask for it. If they are involved in litigation, they are entitled to learn all about adverse medical incidents." Dentists' Br. at 23.

As noted above, however, opponents focus on the already-injured patient. They fail to perceive the initiative's purpose of preventing adverse medical

incidents by patient education – in advance of treatment if possible – and choice of practitioners. A potential patient will not have access to information under any of the processes suggested by opponents.

In their initial brief, the Sponsors exhaustively described various disclosure methods under Florida law, and showed how patients would not be able to find crucial information. *See* FPP Br. at 3-7. The existing systems of disclosure are insufficient, and may even generate a false sense of security by not revealing significant and relevant information before a patient chooses a health care provider. For example, searches of the existing Practitioner Profile would not disclose that one physician had 15 malpractice suits or settlements in twelve years in both Florida and Indiana. *See* FPP Br. at 4, n.4. It does not appear that the opponents' faith in patients' ability to obtain information is borne out in practice.

Floridians do not now have the right to know about adverse medical incidents, and information about those incidents is restricted under current law. As shown above, a significant purpose of this amendment is prevention of adverse medical incidents by allowing potential patients to avoid providers with significant histories of adverse incidents. To achieve that purpose, the amendment makes available information which is not now available. The ballot title and summary are accurate and not misleading.

### E. The Ballot Summary Is Not Misleading Even If It Uses the Word "Should" Instead of "Shall."

Finally, opponents complain that the ballot title and summary should be struck from the ballot because they use the word "should" when the actual amendment text uses "shall" in connection with protecting the identities of patients whose records indicate adverse medical incidents. *See* Dentists' Br. at 24. The opponents suggest that there is a permissive aspect to "should" which is not present when the word "shall" is used. *Id*.

This difference in terms, they contend, will make a difference in the election because "[i]t must be remembered that there will be medical providers voting in the 2004 election, also." *Id*. These medical providers might "want to retain the right to make known patient identity in extreme cases." *Id*. It is unclear why medical providers would want to disclose to one patient the name of another patient who was involved in an adverse medical incident, especially since that disclosure might violate federal health privacy laws. *See, e.g.*, Health Insurance Portability & Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 29 & 42 U.S.C.); 45 C.F.R. § 164.502(a) (2004); *see generally* Office for Civil Rights, U.S. Dept. of Health & Human Svcs., *Standards for Privacy of Individually Identifiable Health Information* (Aug. 2003), *available online at*:

http://www.hhs.gov/ocr/hipaa/finalreg.html. The proposed amendment, in the privacy protection section whose terms are now being discussed, explicitly gives way to federal and state privacy laws in the interest of protecting patient identities.

Nevertheless, even assuming that a voter might want patient identities disclosed, the difference between "should" and "shall" is minimal. In fact, the dictionary definitions of "should" and "shall" provide substantially similar meanings, both suggesting a sense of obligation.[3] The disclosure of the amendment's "chief purpose" is not affected by either of these terms, and there will be no confusion for voters having "a certain amount of common understanding and knowledge." *Advisory Opinion to the Atty. Gen'l re Local Trustees & Statewide Governing Bd. to Manage Florida's Univ. Sys.*, 819 So. 2d 725, 732 (Fla. 2002) (citing *Protect People from the Hazards of Second-Hand Smoke*, 814 So. 2d at 419).

This is not a situation where there is a significant legal difference between the terms of the summary and the actual text, as in *In re Advisory Opinion to the Attorney General re Casino Authorization, Taxation and Regulation,* 656 So. 2d 466, 469 (Fla. 1995), where the summary said that casinos would be "prohibited"

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[3] *See Merriam Webster's Collegiate Dictionary* (10th ed., 1993). *Webster's Collegiate Dictionary* notes first that "should" is the past tense of "shall," before providing other definitions. The reasonable voter would not read significance into the use of the two terms.

but the actual effect was to permit casino operation. In this case, the description of the privacy protections is sufficient to tell the voter that the identities of individual patients are to be protected; the effect of the actual text is to do the same thing, not anything different.

The ballot title and summary are clear, accurate, and not misleading. The proposed Amendment should be permitted to appear on the ballot.

## CONCLUSION

Because the proposed Right to Know amendment presents a single subject in compliance with Article XI, Section 3, and because the ballot title and summary are accurate and informative in compliance with Section 101.161, Florida Statutes, this Court should allow the proposed amendment to appear on the ballot.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 7th day of June, 2004, to the following:

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## CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the type style utilized in this brief is 14-point Times New Roman, proportionately spaced, in accordance with Rule 9.210(a)(2), FLA. R. APP. P.

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