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

INITIAL BRIEF OF THE FLORIDA DENTAL ASSOCIATION

IN OPPOSITION TO THE INITIATIVE

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THE PROPOSED INITIATIVE

The Title of the proposed amendment is "Patients' Right To Know About Adverse Medical Incidents."

The Summary of this proposal, which will be placed on the ballot if this Court approves the initiative, states:

> Current Florida law restricts information available to patients related to investigations of adverse medical incidents, such as medical malpractice. This amendment would give patients the right to review, upon request, records of health care facilities or providers' adverse medical incidents, including those which could cause injury or death. Provides that patients' identitie [sic] should not be disclosed.

The actual initiative provides:

1) Statement and Purpose

The legislature has enacted provisions relating to a patients' bill of rights and responsibilities, including provisions relating to information about practitioners' qualifications, treatment and aspects of patient care. The Legislature has, however, restricted public access to information concerning a particular health care provider's or facility's investigations, incidents or history of acts, neglects, or defaults that may have injured patients or had the potential to injure patients. The information may be important to a patient. The purpose of this amendment is to create a constitutional right for a patient or potential patient to know and have access to records of a health care facility's or provider's adverse medical incidents, including medical malpractice and other acts which have caused or have the potential to cause injury or death. This right to know is to be balanced against an individual patient's rights to privacy and dignity, so that the information available relates to the practitioner or facility as opposed to individuals who may have been or are patients.

2) Amendment of Florida Constitution:

Art. X, Fla. Const., is amended by inserting the following new section at the end thereof, to read:

"Section 22. Patients' Right to Know About Adverse

Medical Incidents.

"(a) In addition to any other similar rights provided herein or by general law, patients have a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident.

"(b) In providing such access, the identify of patients involved in the incidents shall not be disclosed, and any privacy restrictions imposed by federal law shall be maintained.

"(c) For purposes of this section, the following terms have the following meanings:

"(1) The phrases "health care facility" and "health care provider" have the meaning given in the general law related to a patient's rights and responsibilities.

"(2) The term "patient" means an individual who has sought, is seeking, is undergoing, or has undergone care or treatment in a health care facility or by a health care provider.

"(3) The phrase "adverse medical incident" means medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility peer review, risk management, or any representative of any such committees.

"(4) The phrase "have access to any records" means, in addition to any other procedure for producing such records provided by general law, making the records available for inspection and copying upon formal or informal request by the patient or a representative of the patient, provided that current records which have been made publicly available by publication or on the Internet may be "provided" be reference to the location at which the records are publicly available.

3) Effective Date and Severability:

This amendment shall be effective on the date it is approved by the electorate. If any portion of this measure is held invalid for any reason, the remaining portion of this measure, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application.

STATEMENT OF THE CASE

This case was referred to this Court by the Attorney General of the State of Florida on May 11, 2004 pursuant to Article IV, Section 10 of the Florida Constitution and Section 16.061, Florida Statutes, for a review of the proposed constitutional amendment identified herein.

PRELIMINARY STATEMENT

This brief is filed by The Florida Dental Association in opposition to the amendment pursuant to this Court's Order dated May 12, 2004, which set forth a briefing schedule and invited interested parties to file briefs.

The Florida Dental Association (hereafter identified as the "FDA")is an organization of dentists licensed in the State of Florida. It has over 7,000 members at this time, and over 80% of all dentists in Florida are members of the FDA. The FDA's mission is to advance public health through professional education, public advocacy, high practice standards and improving the professional practice environment. As to the dental community, the FDA is the voice of Florida-licensed dentists in the Legislature. The FDA consistently supports legislation that protects the high quality of dental care that Florida's residents receive. *See* http://www.floridadental.org/public/who/.

STANDARD OF REVIEW

The review of a ballot initiative is limited. This Court may only consider two issues: (1) whether the proposed amendment is in compliance with the single-subject requirement of Article XI, Section 3 of the Florida Constitution, and (2) whether the ballot Title and Summary meet the fairness and accuracy requirements of Section 101.161(1), Florida Statutes. *Advisory Op. to the Att'y General re: Authorizes Miami-Dade and Broward County voters to Approve Slot Machines in Parimutual Facilities*, 29 Fla. L. Weekly S233 (May 13, 2004)(*citing Advisory Op. to the Att'y Gen. re: Fish & Wildlife Conservation Comm'n*, 705 So.2d 1351, 1353 (Fla. 1998)).

The FDA recognizes that "[t]he Court must act with extreme care, caution and restraint before it removes a constitutional amendment from the vote of the people," and "thus must approve an initiative unless it is clearly and conclusively defective." *Id.* (*quoting Askew v. Firestone*, 421 So.2d 151, 154, 156 (Fla. 1982)). Likewise, it understands this is not the time for the Court to evaluate the merits or relative wisdom of the proposed initiative. *Id.* (*citing Advisory Op. to the Att'y Gen. re: Right for Citizens to Choose Health Care Providers*, 705 So.2d 563 565 (Fla. 1998)).

All that said, this Court may not simply rubber stamp this, or any, proposed constitutional amendment. There are times when it must reject an amendment because the sponsors simply fail to comply with the few rules which do apply to the process in place for amending our constitution. For example, if the ballot does include more than one subject, or substantially impacts more than one distinct governmental power or function, it must be rejected. *Advisory Op. to the Att'y Gen. re: Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So.2d 888, 892 (Fla. 2000); *Fish & Wildlife*, 705 So.2d at 1351, 1353-54; *Advisory Op. to Att'y Gen. re: Requirement for Adequate Public Education Funding*, 703 So.2d 446, 450 (Fla. 1997). If an amendment will substantially affect on the operation of multiple levels of government, it must be rejected. *Advisory Op. to the Att'y Gen. re: People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So.2d 1304, 1304 (Fla. 1997). Initiatives which make empty promises must be rejected, *Advisory Op. to the Att'y Gen. - Save Our Everglades*, 636 So.2d 1336, 1341-42 (Fla. 1994) and amendments which do not provide the voters with enough information to really know what they are voting for cannot be allowed to stand. *Advisory Op. to*

Att'y Gen. re: Term Limits Pledge, 718 So.2d 798, 804 (Fla. 1998). This Court has recognized that the obligation to review a proposed constitutional amendment is so important that it must conduct the review even if there are no opponents to the proposal. *Advisory Op. to the Att'y Gen. re: Stop Early Release of Prisoners*, 642 So.2d 724 (Fla. 1994)("We emphasize that we have no choice in conducting an independent review in light of the lack of argument by interested parties.")

In other words, while a proposed amendment will be sent to the people for a vote even if it is not perfect, this Court has an important job to do in making sure that it meets the few rules that apply.

SUMMARY OF THE ARGUMENT

The proposed amendment in this case must be rejected because it fails to comply with either the constitutional or statutory requirements for ballot initiatives.

First, it does not comply with the single-subject requirement because the amendment substantially impacts several different governmental functions. The proposal would repeal an entire area of statutory law which provides that peer review materials are not discoverable. It also, however, effectively overrules over 50 years of common law with respect to discovery, as well as procedural rules for which this Court has the

exclusive constitutional power to enact, by eliminating the work product privilege for providers and facilities.

The practical effect of the amendment also destroys the attorney-client privilege for any materials which are otherwise privileged but are "received" by a provider or facility and which involve adverse medical incidents. This would effectively repeal Section 90.502, Florida Statutes and 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.

This Court has made it clear that an amendment cannot stand when it impacts several government functions like this. Thus, the amendment fails the single-subject test.

The amendment also fails the Summary and Title test. Section 101.061(1), Florida Statutes, requires that the Summary and Title provide accurate, complete, fair information to the voter. The Summary and Title here do not do that. First, they fail to fully inform the voters of the practical impact of this amendment on the existing peer review scheme. This prevents the voters from making a knowledgeable decision about what they might be giving up to get what is being offered in the amendment. 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 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. Thus, the amendment fails to comply with Section 101.061(1), Florida Statutes.

The proposed amendment should be rejected.

ARGUMENT

1. The Proposed Amendment Should Be Rejected Because It Violates The Single Subject Requirement By substantially impacting more than a single government function.

Constitutional amendments should not be put before the voters unless they "shall embrace but one subject and matter directly therewith." Art. XI, § 3, Fla. Const. The purpose of this requirement is to protect against sweeping changes to the legal landscape based on ballot initiatives. "The single-subject requirement applies to the citizen initiative method of amending the constitution because

> section 3 [citizen initiative] does not afford the same opportunity for public hearing and debate that accompanies the proposal and drafting processes of sections 1, 2, and 4. Accordingly, section 3 protects against multiple 'precipitous' and 'cataclysmic' changes in the constitution by limiting to a single subject what might be included in any one amendment proposal."

Advisory Op. to the Att'y Gen. re: Voluntary Universal Pre-Kindergarten Educ., 824 So.2d 161, 164 (Fla. 2002)(*quoting Fish & Wildlife*, 705 So.2d at 1353).

The single subject rule serves two distinct purposes. First, it prevents "logrolling." Public policy requires that citizens not be forced to vote for or against one issue simply because it is tied to a separate issue. 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). A proposed amendment meets this single-subject requirement if it has a "logical and natural oneness of purpose." *Id. at 990*.

The second purpose is to "prevent a constitutional amendment from substantially altering or performing the functions of multiple aspects of government, or from affecting other provisions of the constitution." *Voluntary Pre-Kindergarten*, 824 So.2d at 165; *In Re Advisory Op. to the Att'y Gen. - Restricts Laws Related To Discrimination*, 682 So.2d 1018, 1020 (Fla. 1994).

An amendment will fail if it runs afoul of either of these purposes behind the single subject requirement. The FDA believes that the Adverse Medical Incident amendment violates the second purpose of the single subject requirement.[1]

This amendment would substantially impact the legislative and judicial branches of government. It provides that every Floridian has an unqualified right to obtain materials regarding adverse medical incidents prepared or received by a health care provider or health care facility. This includes, by definition,

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[1] The FDA does not take a position either way as to whether this initiative meets the "no log-rolling" purpose of the single-subject rule.

information that is protected in various ways by several distinct governmental functions.

First, the legislature has provided protection for certain materials maintained by providers and facilities. Florida law requires that health care facilities conduct peer reviews to ensure quality control of medical care. *See generally* § 395.0193, Fla. Stat. (2003). As a trade off, the law provides protection for the materials and information generated thereto:

> The investigations, proceedings, and records of the peer review panel, a committee of a hospital, a disciplinary board, or a governing board, or agent thereof with whom there is a specific written contract for that purpose, as described in this section shall not be subject to discovery or introduction into evidence in any civil or administrative action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by such group or its agent, and a person who was in attendance at a meeting of such group or its agent may not be permitted or required to testify in any such civil or administrative action as to any evidence or other matters produced or presented during the proceedings of such group or its agent or as to any findings, recommendations, evaluations, opinions, or other actions of such group or its agent or any members thereof. . .

§ 395.0193(8), Fla. Stat. (2003). And,

> The investigations, proceedings, and records of a committee as described in the preceding subsections shall not be subject to discovery or introduction into evidence in any civil or administrative action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by such committee, and no person who was in attendance at a meeting of such committee shall be

> permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions, or other actions of such committee or any members thereof.

§ 766.101(5), Fla. Stat. (2003).

The benefits to the public of peer review meetings, and the need to protect the information exchanged and learned therein, is so important that even such meetings at public hospitals are not required to be open, and any materials generated therein are exempt from the public records law. § 395.0193(7), Fla. Stat. (2003). In other words, the legislature has exercised its constitutionally granted power to make limited exceptions[2] to the public records laws to guaranty 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. The privilege created by these statutes was designed "to provide that 'degree of confidentiality necessary for the full, frank medical review and evaluation which the legislature sought to encourage' by requiring such peer reviews." *Mount Sinai Med.*

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[2] Art. I, § 24(c), Fla. Const.

Center v. Bernstein, 645 So.2d 530, 532 (Fla. 3d DCA 1994)(*quoting Holly v. Auld*, 450 So.2d 217, 220 (Fla. 1984)). This Court has recognized that:

> The privilege afforded to peer review committees is intended to prohibit the chilling effect of the potential public disclosure of statements made to or information prepared for and used by the committee in carrying out its peer review function.

Cruger v. Love, 599 So.2d 111, 114-15 (Fla. 1992). It is undisputed that the adverse medical incident amendment would overrule the legislature's policy making function in this area.

However, the effect of the amendment does not stop with the legislature. It also substantially impacts the power of the judiciary by restricting the Rules of Civil Procedure and by effectively overruling years of common law on discovery.

This Court has been granted the power to adopt procedural rules for the courts. Art. V, § 2(a), Fla. Const. It enacted the Rules of Civil Procedure with that constitutionally granted power. In part, these Rules govern the discovery of information. Florida Rule of Civil Procedure 1.280(c) restricts the discovery of work product. Regardless of any statutory privilege, incident reports generated by providers and facilities constitute work product pursuant to this Court's Rules and are not discoverable absent a showing of undue hardship. *See Healthtrust Inc. v. Saunders*, 651 So.2d 188, 189

(Fla. 4th DCA 1999)(quashing trial order compelling production of work product); *North Broward Hospital Distr. v. Button*, 592 So.2d 367, 368 (Fla. 4th DCA 1992)(same); *All Children's Hospital, Inc. v. Davis*, 590 So.2d 546, 547 (Fla. 2d DCA 1991)(same); *Bay Medical Center v. Sapp*, 535 So.2d 308, 311 (Fla. 1st DCA 1988)(same).

The proposed amendment also substantially impacts both the legislative and judicial branches in an area which may not be intended by the amendment, but exists by the plain language of the proposal. Proposed Section 22(a) provides that "patients have a right to access to *any records made or received* in the course of business by a health care facility or provider relating to any adverse medical incident." (Emphasis added). The plain language of this proposal will substantially restrict the attorney-client privilege. Any physician sued, or even involved in potential litigation will likely make or receive legal correspondence from his/her counsel about their cases. These will be "records . . . relating to [] adverse incident[s]." There is nothing in the amendment to suggest such correspondence will be privileged. Anything that relates to an "adverse medical incident" would be accessible to any patient or potential patient as a matter of constitutional right.

This impinges on the power of both the legislature and the judiciary. The attorney-client privilege has been codified by the legislature. "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client." § 90.502(2), Fla. Stat. (2003). This 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.

The abrogation of the attorney-client privilege for providers and facilities also seriously affects the judiciary. This Court has grafted duties associated with the attorney-client privilege into the Rules Regulating the Florida Bar. The Constitution grants this Court the "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, § 15, Fla. Const. Pursuant to this grant of power, this Court adopted the Rules Regulating the Florida Bar. Rule 4-1.6 imposes an affirmative obligation on lawyers not to disclose attorney-client privileged information. The plain language of 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. Clearly, this is a substantial impact on the judiciary. The amendment impedes on this Court's constitutionally granted exclusive authority to make discipline rules for members of the Florida Bar.

This Court has already held that a ballot initiative which impacts both the power of the legislature and the power of the judiciary cannot stand. *Evans* v. Firestone, 457 So.2d 1351, 1354 (Fla. 1984). There, the sponsors sought to amend the constitution to a) limit a party's liability to his/her percentage of negligence; b) raise summary judgment to a constitutional right; and c) limit non-economic damages to $100,000. *Id*. at 1353. This violated the single subject requirement because:

> The proposed amendment before [this Court] affects the function of the legislative and the judicial branches of the government. Provisions a and c of the amendment, which limit a defendant's liability, are substantive in nature and therefore perform an essentially legislative function. On the other hand, provision b, elevating the summary judgment rule currently contained in Florida Rule of Civil Procedure 1.510, is procedural and embodies a function of the judiciary. We recognize that *all* power for each branch of the government comes from the people and that the citizens of the state have retained the right to broaden or to restrict that power by initiative amendment. But where such an initiative performs the functions of different branches of government, it clearly fails the functional test for the single-subject limitation the people have

> incorporated into article XI, section 3, Florida Constitution.

Id. at 1354 (emphasis in original).

There is no reason to treat this proposed amendment any differently than the one that failed in ***Evans***. Each case involves a proposal which changes both the substantive law established by the legislature and the procedural law of the judiciary. Both "perform the functions of different branches of government." *Id.*

These are not minor functions, either. This is not a case where this Court can excuse the effect on separate governmental functions as being unimportant or incidental. The legislative function with respect to peer review materials involves a critical balance of competing ideals. The legislature weighed the public interest in encouraging providers and facilities to see where mistakes were made so they can be avoided next time against the public's desire to see those records. The legislative intent is clear. The peer review requirements were based on the trade-off that the information would not be available to the public.

The judicial branch has done the same thing in creating Rule 1.280(c), but for somewhat different reasons. This Court, in creating Rule 1.280, adopted the common law ideal that parties

who generate information in anticipation of litigation should not be required to give that information to anyone else. This judicial privilege has existed for over a half century. *See Hickman v. Taylor*, 329 U.S. 495 (1947); *Atlantic Coastline R.R. Co. v. Allen*, 40 So.2d 115 (Fla. 1949). Eliminating that judicial privilege via constitutional amendment is a major change in the legal landscape controlled by the judiciary. When it is combined with the impact on the legislative function, it is obvious this amendment substantially impacts more than one governmental function. It cannot reasonably be argued that eliminating the statutory attorney-client privilege and impeding this Court's power to set the Rules for its members, is a minor or incidental impact on the legislature and judiciary. Thus, it violates the single-subject requirement and must be stricken.

2. The Proposed Amendment Should Be Rejected Because It Fails To Fairly And Sufficiently Advise The Voters So As To Enable Them To Intelligently Cast Their Ballots.

Florida law provides that when it comes time for our citizens to vote, they will be provided a Title and Summary of the proposed amendment rather than the actual amendment. § 101.161(1), Fla. Stat. (2003). Thus, the language of the Title and Summary must be as accurate as possible to give the voters the necessary information on which to decide how to vote. "[T]he law require[s] . . . that the ballot be fair and advise

the voter sufficiently to enable him intelligently to cast his ballot." *Askew v. Firestone*, 421 So.2d at 155 (*quoting Hill v. Millender*, 72 So.2d 796, 798 (Fla. 1954)). "In order for the public to fully comprehend the contemplated changes of a proposed amendment, section 101.161(1), Florida Statutes [], provides in pertinent part that

> [w]henever a constitutional amendment . . is submitted to the vote of the people, the substance of such amendment . . . shall be printed in clear and unambiguous language on the ballot. . . The substance of the amendment . . . shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

Term Limits Pledge, 718 So.2d at 803. "The purpose of the statute is 'to provide fair notice of the content of the content of the proposed amendment so that the voter will not be misled as to its purpose. . .'" *Id*. (*quoting Health Care Providers*, 705 So.2d at 566; *Advisory Op. to Att'y Gen. re: Fee on Everglades Sugar Prod.*, 681 So.2d 1124, 1127 (Fla. 1996)). This Court requires that "the title and summary be (a) 'accurate and informative,' *Smith v. American Airlines*, 606 So.2d 618, 621 (Fla. 1992), and (b) objective and free from political rhetoric, *see Evans*, 457 So.2d at 1355; *Save our Everglades*, 636 So.2d at 1341." *Advisory Op. to Att'y Gen. re: Tax Limitation*, 644 So.2d

486, 490 (Fla. 1994). "A ballot summary may be defective if it omits material facts necessary to make the summary misleading." *Id.* (*quoting Advisory Op. to Att'y Gen. - Limited Political Terms in Certain Elected Offices*, 592 So.2d 225, 228 (Fla. 1991)).

The ballot title and summary in this case do not properly apprise the voters of the issue upon which they will be voting. They are insufficient in some ways, and misleading in others. The initiative should be rejected.

A. The Ballot Title And Summary Do Not Properly Apprise The Voter Of The Effect On The Peer Review Statutes And Fail To Inform The Voters Of The Likely Trade-Off For This Amendment.

A ballot initiative is considered misleading if it reveals only one half of a constitutional trade-off in the summary. *Askew,* 421 So.2d at 157-58. In that case, Justice Ehrlich noted that a ballot summary which does not tell the voters what they are giving up to vote in the new amendment does not sufficiently inform the voters.

The same rationale applies here. 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. As discussed above, the current state of the peer review statutes

is based on the legislative balance between the benefit of encouraging (requiring) the “full and frank” discussions that make it possible to improve the quality of medical care against the problems associated with requiring that information to be made available to third parties.

Given that the entire peer review scheme involves a balance of important interests, there is every likelihood that making peer review materials subject to public disclosure may very well result in an abandonment of the entire scheme. The FDA understands this might not occur, but it is a very real possibility. The ramifications of that possibility are far-reaching. Voters could end up giving up the benefits of peer review (higher quality medical care) for the potential to have access to records that may not even exist if this amendment is passed. It does not take much thought to realize that if the amendment gives such free access to records created by or provided to providers and facilities, they will not maintain any such documents. And, it is likely the legislature may not require them to do so.

This potential impact alone is not sufficient reason to strike the amendment. The voters have every right to make a decision that may not be a good idea down the road. However, the Summary and Title requirements do require that they be

apprised of those probable impacts. *Stop Early Release of Prisoners*, 642 So.2d at 726-27.[3] This one does not do that. The text of the current Title and Summary does not even refer to the existing peer review scheme. It cannot be assumed the voters will understand how seriously this amendment will impact this. *American Airlines*, 606 So.2d at 621 (although voters are expected to inform themselves about the ballot measures, the ballot title and summary are expected to be "accurate and informative.") *Askew*, 421 So.2d at 156 ("The burden of informing the public should not fall only on the press and opponents of the measure - the ballot title and summary must do this.").

The FDA understands that the voters are expected to have normal intelligence and exercise common sense. However, they cannot be presumed to have special knowledge or legal expertise. *Tax Limitation*, 673 So.2d at 868. With this amendment, the proponents seek to destroy a specific balance between peer

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[3] In that case, this Court concluded sua sponte that while the Summary claimed the amendment would "ensure" that prisoners served at least 85% of their sentences, the reality was that it was more likely that notwithstanding the amendment, many prisoners would have to be released early through clemency to avoid prison overcrowding. Likewise, 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. This failure to inform is exacerbated by the fact that the voters would give up all the benefits of peer review and then get nothing in return.

review benefits and confidentiality, as well as decades old common law on work product, without informing the voter that this is what the amendment does. Voters cannot make an informed decision about this without being told, at the very least, that this destroys the peer review and work product protections now available.

Indeed, the failure to even use the term "peer review" in the Title or Summary, while it is expressly contained in the amendment itself, appears designed to mislead voters. If the term "peer review" were in the Summary, and thus contained in sample ballots obtained by voters before election day, they could at least look into the issue and learn about the balance the legislature has struck for their benefit. However, without the words even being in the Summary or Title, only voters already familiar with the peer review scheme will even know what the true effect of the amendment may be. Even those voters could be misled by the Summary, believing that the failure to specifically mention the peer review[4] scheme, which has provided

[4] It is interesting that whereas the statute permits 75 words in the summary, the summary here has less than 60 words. At first blush this could be seen as brevity, but when this Court considers the Summary omits any reference at all to something as critical as the peer review scheme, the notion of brevity morphs into deception.

so much legal protection, may mean that peer review materials would not be subject to the amendment.

B. The Ballot Title And Summary Do Not Inform The Voters That The Amendment Amends The Florida Constitution By Restricting The Power Of This Court To Establish Its Procedural Rules And To Regulate Attorneys.

This Court previously held that if a proposed amendment will grant new powers to a constitutional officer, the voters must be told about this in the ballot Summary. *Term Limits Pledge*, 718 So.2d at 804. There, the proposed amendment would have had the Florida Secretary of State permit, but not require, candidates to execute a "term limits pledge," to place language informing voters who took the pledge on ballots, and to place language informing voters if a candidate broke the pledge. *Id.* at 800. The amendment went on to require that the Secretary of State "shall implement this section by rule." *Id*.

This Court held that the failure of the summary to inform the voters of the substantial impact on Article IV of the Florida Constitution regarding the Secretary of State's duties was fatal. Interestingly, the summary did inform the voters that the proposed amendment would *affect* the powers of the Secretary of State, but that was not enough. *Id*. at 803. This rendered the amendment invalid because "[t]he ballot summary fails to inform the public that the Secretary of State would be

granted discretionary constitutional powers concerning elections that the Secretary of State presently does not possess." *Id.* at 804; *see also Stop Early Release of Prisoners*, 642 So.2d at 726(holding that amendment which modified powers of the Clemency Commission without telling the voters was defective); *Tax Limitation*, 644 So.2d at 493 (holding that amendment that substantially affects existing constitutional provisions must inform voters of that or be defective); *Fine*, 448 So.2d at 989 (holding identification of constitutional provisions that would be affected "is necessary for the public to be able to comprehend the contemplated changes in the constitution.")

The reasoning behind this Court's holding in *Term Limits Pledge* applies to this case, but in reverse. Just as the voters must be told when a Constitutional power of part of the State is being *expanded* in order to be fully informed, so must the voters be informed when a proposed amendment will substantially *restrict* the constitutional powers of part of the State. There is no logical reason to require the voters be made aware of the expansion of power but not the restriction of power. This information is necessary so the voters can "comprehend the contemplated changes in the constitution." *Fine*, 448 So.2d at 998.

It cannot be disputed that the Adverse Medical Incidents amendment substantially restricts the constitutional powers of the judiciary. As described above, the amendment will at best restrict this Court's ability make procural 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. While the amendment can do that (assuming compliance with the single-subject requirement), it must clearly inform the voters of these effects. This initiative does not do that. Thus, the amendment should be rejected.

C. The Ballot Title And Summary Improperly Contain Political Rhetoric and Commentary.

"[T]he ballot summary is no place for subjective evaluation of special impact. The ballot summary should tell the voter the legal effect of the amendment, and no more. The political motivation behind a given change must be propounded outside the voting booth." *Evans*, 457 So.2d at 1355. In *Evans*, this Court held that editorial comment, "thus avoiding unnecessary costs," in relation to a litigation reform proposal violated the rules governing the ballot summary. *Id.*

The summary here suffers the same infirmity. Once the amendment discusses the patient's right to access records of "adverse medical incidents," which is all that is needed to

explain its legal effect, the amendment goes on to gratuitously add "such as medical malpractice." Likewise, when it again discusses "adverse medical incidents" later in the summary, there is the editorial comment "including those which could cause injury or death." These comments are not necessary to describe this amendment. They are completely superfluous[5], and are no more than the beginning (or end) of the sponsors' ad campaign. This cannot be permitted.

D. The Ballot Title and Summary Mislead The Voters By Giving The Impression No Adverse Medical Incident Information Is Currently Available To The Public.

The Summary provides "Current Florida law restricts information available to patients related to investigations of adverse medical incidents. . ." This statement is misleading. It gives voters the impression there is no way to get this information today. That is not true. While there is no open-ended constitutional right to obtain information of adverse medical incidents, there are existing methods to obtain this type of information. For example, patients in litigation can obtain redacted records of relevant adverse incidents. *See Amente v. Newman*, 653 So.2d 1030, 1032 (Fla. 1995). Patients

[5] It is also interesting to note that the sponsors found it necessary to include this superfluous language while omitting language regarding the potential affect the amendment would have on the peer review scheme.

can also obtain very important trend information on adverse medical incidents in the State from the Agency for Health Care Administration. § 395.0197(9), Fla. Stat. (2003). And, the same Florida laws which establish the peer review privilege make clear that the privilege does not extend beyond the actual peer review process.

> However, information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil or administrative action merely because they were presented during proceedings of such group, and any person who testifies before such group or who is a member of such group may not be prevented from testifying as to matters within his or her knowledge, but such witness may not be asked about his or her testimony before such a group or opinions formed by him or her as a result of such group hearings.

§ 395.0193(8), Fla. Stat. (2003)(emphasis added).

> However, information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil action merely because they were presented during proceedings of such committee, nor should any person who testifies before such committee or who is a member of such committee be prevented from testifying as to matters within his or her knowledge, but the said witness cannot be asked about his or her testimony before such a committee or opinions formed by him or her as a result of said committee hearings.

§ 766.101(5), Fla. Stat. (2003)(emphasis added). Thus, while the sponsors of the amendment may want more access than is currently available, it is inaccurate to suggest in the Summary that no information is currently available.

A ballot summary can be defective as much for what it does not say as what it does say. *Fish & Wildlife*, 705 So.2d at 1355; *Askew*, 421 So.2d at 156. This ballot Summary fails to inform the voters that they already have access to this type of information. "When the summary of a proposed amendment does not accurately describe the scope of the text of the amendment, it fails in its purpose and must be stricken." *Term Limits Pledge*, 718 So.2d at 804.

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. Although some information is restricted, patients can get information in other ways. 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, even if those were discussed in peer review. There is nothing to prevent a litigant from deposing witnesses with knowledge of about adverse incidents. In other words patients already have a "right to know" about the incidents. That is not really what the amendment is about. The amendment is really about providing a specific degree of access to such records, by eliminating important legislatively adopted and judicially created exceptions. This misleading Title should

prevent this amendment from being provided to the voters. *See Save our Everglades*, 636 So.2d at 1341 (holding that title "SAVE OUR EVERGLADES" was misleading where it implied the Everglades were lost, when they were not).

E. The Ballot Title And Summary Are Inconsistent With The Language In The Actual Amendment.

Both the actual amendment and the Summary purport to address the impact this amendment would have on the privacy rights of patients whose records constitute records of adverse incidents. However, they use legally distinct words to describe this impact. The amendments says the "identity of patients . . . *shall* not be disclosed." The Summary says the amendment "provides that patients' identitie[] [sic] *should* not be disclosed." Reasonable voters could misunderstand this distinction. The term "shall" is, to most people, a mandatory instruction. It means that something will not happen. However, the term "should" is more vague. Reasonable voters could assume that the use the term means that non-disclosure is the ideal, but that under some circumstances the identities may be available.

It must be remembered that there will be medical providers voting in the 2004 election, also. There may be many who think the general idea of making adverse incident reports available is

a good idea, but would want to retain the right to make known patient identity in extreme cases. Those voters could read the term “should” as allowing exceptions to the rule, just as it is commonly understood that other protected information which “should” not be required to be disclosed is sometimes disclosed under special circumstances. One example of this is the work product doctrine. Work product “should” not be discoverable, but is if certain conditions apply. Medical providers may understand the term like this based on experience with the legal system, or by hearing about the experience of those in the legal system.

Unfortunately, the term “should” is not in the amendment. There is no room for interpretation in the language of the amendment. Voters could be misled into voting for the amendment because they believe the courts would be left with the discretion to determine if the ideal that identity “should” not be disclosed may be overcome. This confusion would have been avoided by simply using the same word in the amendment and the Summary.

This Court has already found amendments invalid for changing words from the amendment to the Summary. For example, in *Treating People Differently*, it found the use of the term “people” in the Summary, but the term “persons” in the amendment

to be legally distinct. 778 So.2d at 896-97. In *Right of Citizens to Choose Health Care*, it found the use of the terms "citizens" in the Summary was confusing when the term "natural persons" was used in the amendment. 705 So.2d at 566. In *People's Property Rights Amendments*, it found that the voters could be confused by the use of the term "owners" in the Summary and the use of the term "people" in the Title. 699 So.2d at 1308-09. A review of each of those cases shows that the terms were not substantially different. The point was that there was a subtle difference between the language that meant the voters were not getting a clear description of what they were doing. The same is true here. Voters could read the Summary here as providing the ability for courts to allow the disclosure of names, but the amendment makes clear there would be no such power. The initiative should be rejected.

CONCLUSION

The Adverse Medical Incidents amendment violates Article 3, Section XI of the Florida Constitution by substantially impacting more than one governmental function. Further, it violates the ballot requirements of Section 101.161(1), Florida Statutes because it is misleading and fails to fully apprise the voters of the intent, scope, and impact of the amendment on

existing issues and of the substantial restriction on the judiciary the amendment will impose.

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).

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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 24th day of May, 2004 to the following list of counsel.

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