IN THE SUPREME COURT OF FLORIDA
Case No. SC04-778

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: PUBLIC PROTECTION FROM
REPEATED MEDICAL MALPRACTICE
CONSTITUTIONAL AMENDMENT

ANSWER BRIEF OF THE FLORIDA DENTAL ASSOCIATION

IN OPPOSITION TO THE INITIATIVE

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The Amendment here should be stricken. The Initial Brief of the Sponsor improperly argues the merits of the proposal, and does so with incomplete and irrelevant statistics. It also fails to recognize the clear impact this proposal would have on the judiciary and on the Florida Constitution. Finally, it fails to recognize that the Title and Summary fail to define to whom the Amendment will apply.

ARGUMENT

1. The FPP "Statement Of The Case" Is Largely Irrelevant To This Court's Consideration Of This Issue.

A large part of the Floridians for Patient Protection's Statement of the Case is irrelevant to the issues herein. First, it argues the merits of the Amendment, not the technical requirements. Second, to the extent the merits are relevant at all, the facts discussed therein do not relate to the Amendment here. The FPP notes that most (alleged) malpractice "is committed by a tiny minority of doctors." Floridians for Patient Protection Initial Brief, p. 2. However, it follows this with citations discussing settlements, which may have as much to do with potential risks than with actual malpractice. It complains that of many physicians who have settled three or more cases, only 13.8% have been disciplined. *Id*. at 3. The

inference is that any physician who settles a case did something wrong. This inference cannot be made, especially since the physician's insurance company has the ultimate decision-making power to settle claims.

The FPP claims that the Florida Disciplinary authorities are not doing their job by citing to several examples from a website. These make the same illogical inference. It cannot be suggested that looking at mere settlement statistics will inform us as to whether those doctors are dangerous. There are numerous other factors involved, such as the riskiness of a physician's specialty, the judicial climate in which that doctor resides, and even more remote factors such as whether they are insured with companies which tend to settle more or whether certain trial lawyers have "targeted" the physician.

It is interesting that the extent of the "merit" argument presented is a set of incomplete statistics. There are no suggestions of actual doctors posing an actual threat to the public and who have not been disciplined. Instead, there is simply the stated conclusion that the disciplinary agency must be wrong when it concludes that physicians who were sued three or more times must be dangerous.

Finally, all of the stated statistics are not related in any way to the Amendment. While the Amendment does significantly

reduce the due process requirements available to physicians in Florida, it does not yet allow license revocation simply because a physician is sued three times. The citation of a multitude of settlements is completely unrelated. Only "findings of malpractice" would be relevant. The FPP did not identify a single example of a physician with three such "findings" who was not substantially disciplined or lost his or her license. Thus, there is nothing in the "merits" argument that is even remotely relevant.

2. The Proposed Amendment Has A Clear Effect On The Judicial Branch.

The FPP suggests there will be no effect on the judicial branch of government in this case. FPP Initial Brief, p. 15. The claim is important, because the FPP appears to recognize that if there is such an effect, this Amendment cannot pass the single-subject test. The claim, however, is wrong.

It is undisputed this Court has already established, as a matter of right, that physicians (and other professionals) are entitled to the due process protection afforded by the clear and convincing standard of proof when they face license revocation. Likewise, this Court has required that they not be subject to such discipline except for "substantial" reasons. *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987). The effect of this

Amendment will be to remove those due process protections. This is as serious an effect on the judicial branch as can be imagined. The Amendment will not only substitute legislative policy judgment, it will substitute judicial policy judgment. It "usurps the function of the judiciary," notwithstanding the FPP's claim that it does not. FPP Initial Brief, p.15. Indeed, while the FPP asserts that the Amendment "only comes into effect after the courts have acted" is false. The Amendment continues to work in a judicial function even after the initial "findings" of malpractice by lowering both the standard of proof and the degree of offense necessary to revoke a license. This cannot be permitted.

3. THE PROPOSED AMENDMENT WILL AFFECT OTHER SECTIONS OF THE CONSTITUTION.

The FPP claims the Proposed Amendment will not affect other sections of the Constitution. FPP Initial Brief, p. 18. This is not true. As stated above, this Court requires that "where the proceedings implicate the loss of livelihood, an elevated standard of proof is necessary to *protect the rights and interests* of the accused." *Ferris*, 510 So.2d at 295 (emphasis added). These rights and interests do not exist in a vacuum. They are derived from the entitlements to which all Floridians are entitled under Article I, Section 9 of the Florida

Constitution. While this Court did not expressly say it, the holding in *Ferris* is clearly a decision based on a license-holder's due process rights. There is no where else from where this required burden of proof would stem. The effect of this Amendment would be to effectively "write into" Article I, Section 9 that in physician license revocation cases, due process only requires a preponderance standard. This would be a substantial change. It cannot be reasonably suggested that this Amendment "will not affect" other sections of the Constitution.

4. The Title And Summary Of The Proposed Amendment Do Not Define To Whom The Amendment Will Apply.

The FDA will not re-argue the numerous ways in which this Amendment mis-states the current state of the law or the ways in which it omits important information from the Title and Summary. However, there is another example of incomplete and inconsistent information which must be discussed.

The Title discusses "medical malpractice." The Summary discusses the prohibition of licensure for "medical doctors" who have committed "medical malpractice." This terminology is vague. There is no clear meaning to the term "medical doctor," at least in terms of the various practices in Florida. Does the term mean "physicians" licensed under Chapter 458? Does the term include dentists licensed under Chapter 466? It is impossible to tell. Dentists may be liable for "medical malpractice" for purposes of presuit requirements. *Hord v. Taibi*, 801 So.2d 1011 (Fla. 4th DCA 2001). However, they are not subject to discipline by the Board of Medicine; they are subject to the Board of Dentistry. *See* § 466.004, Fla. Stat. (2003). Other statutes indicate there is a distinction between a "medical doctor" and a "dentist." *See e.g.* § 61.403(2), Fla. Stat. (2003); § 455.241, Fla. Stat. (2003). At least one court has "defined" medical doctors as those licensed under Chapter

458. *Robinson v. Shands Teaching Hospital*, 625 So.2d 21, 28 (Fla. 1st DCA 1993)(identifying Chapter 458 as dealing with [medical doctors]).

Does the use of the term "medical malpractice" mean that any provider who can commit "medical malpractice" as contemplated in Chapter 766 is subject to the amendment? Or, is the scope of the Amendment limited to the limited notion of "medical doctors" as defined by the First District Court of Appeal - those licensed under Chapter 458? This could have been made clear by the sponsors. They could have used the specific practices they intend to be governed to describe its scope. They could have said it was limited to certain practices, or applicable to anyone who was subject to particular licensing bodies. They could have clearly defined to whom the Amendment would apply in the actual Amendment, and informed the voter in the Summary that this information was contained there.[1] They did none of those things.

The ambiguity as to whom is subject to this Amendment is a fatal defect. The voters must be told what they are voting for or against. Here, they have no basis to even understand who

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[1] One of the other Amendments proposed by the FPP is expressly limited to physicians licensed under Chapter 458. See Case No. 04-779. They could have been clear in this case, also.

this Amendment will affect. Voters cannot even go to the statutes to inform themselves of what the term "medical doctor" means because it has no specific meaning. They can, at best, infer that by the Legislature's use of the term as one in addition to many medical-related professions, the Amendment might be limited to only "physicians." This Court has never before required voters to inform themselves to this degree, and should not begin doing so now. The sponsors should have been more clear, and they were not. The Amendment should be rejected.

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).

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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 1st day of June, 2004 to those identified on the following list of counsel.

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