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

ANSWER BRIEF OF OPPONENT, FLORIDA MEDICAL ASSOCIATION, INC.

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Ballot Title, Ballot Summary, and Text

The **ballot title** for the proposed amendment is "Public Protection from Repeated Medical Malpractice."

The **ballot summary** states as follows:

Current law allows medical doctors who have committed repeated malpractice to be licensed to practice medicine in Florida. This amendment prohibits medical doctors who have been found to have committed three or more incidents of medical malpractice from being licensed to practice medicine in Florida.

The **text** of the proposed amendment provides as follows:

BE IT ENACTED BY THE PEOPLE OF FLORIDA THAT:

a) Statement and Purpose:

Under current law, a medical doctor who has repeatedly committed medical malpractice in Florida or while practicing in other states or countries may obtain or continue to hold a professional license to practice medicine in Florida. The purpose of this amendment is to prohibit such a doctor from obtaining or holding a license to practice medicine in Florida.

b) Amendment of Florida Constitution:

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

Section 20. Prohibition of Medical License After Repeated Medical Malpractice.

a) No person who has been found to have committed three or more incidents of medical malpractice shall be licensed or continue to be licensed by the State of Florida to provide health care services as a medical doctor.

b) For purposes of this section, the following terms have the following meanings:

i) The phrase "medical malpractice" means both the failure to practice medicine in Florida with that level of care, skill, and treatment recognized in general law related to health care providers' licensure, and any similar wrongful act, neglect, or default in other states or countries which, if committed in Florida, would have been considered medical malpractice.

ii) The phrase "found to have committed" means that the malpractice has been found in a final judgment of a court or law, final administrative agency decision, or decision of binding arbitration.

c) 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 form the void portion and given the fullest possible force and application.

SUMMARY OF THE ARGUMENT

The sponsor's Initial Brief fails to refute the Florida Medical Association's showing of clear and conclusive defects in the proposed amendment. The sponsor makes no defense to its use of the emotional political slogan "public protection" in the title of the amendment while the summary and text say nothing about protecting the public against anything. The sponsor admits that the opening phrase of the ballot summary, representing that "Current law allows" medical doctors to keep their licenses after repeated malpractice, is at best true only in some cases. The sponsor admits that the defined terms in the amendment are "essential" to understanding how the amendment will operate, but offers no excuse for the failure to define the terms in the summary or even to advise the voter that the terms are defined in the text. The sponsor admits that the amendment substantially performs executive branch functions, and admits that the amendment performs legislative functions, but attempts to characterize those legislative functions as too slight to count against that amendment under the single-subject rule.

Fair and objective testing of the ballot title, ballot summary, and text of this proposed amendment against this Court's legal standards reveals that the proposal is clearly and conclusively defective. The title uses electioneering to sway the voter, without accurately reflecting the text of the amendment. The summary misleads with a half-truth about the current state of Florida law, fails to explain key defined terms to

the voter, and uses undefined terms that are ambiguous and misleading. It also omits material information necessary to inform the voter fully as to the terms and effect of the amendment. The amendment substantially alters or performs the functions of all three branches of government. The Court should strike this initiative from the ballot.

ARGUMENT

I. THE BALLOT TITLE AND BALLOT SUMMARY ARE FATALLY FLAWED.

In its Initial Brief opposing this amendment, the Florida Medical Association, Inc. pointed out numerous flaws that render the ballot title and summary clearly and conclusively defective, including the following:

- The ballot title improperly uses the phrase "public protection," an emotional and political appeal that does not reflect anything in the summary or text. [FMA In. Br. 6-11.]

- The ballot summary uses a misleading half-truth, representing that a "yes" vote on this amendment is necessary to change the law so that physicians who commit repeated malpractice will lose their licenses, although current law already allows for de-licensure of such physicians. [FMA In. Br. 12-17.]

- The ballot summary is misleading for using the operative phrases "medical malpractice" and "found to have committed," without advising the voter that they are specially defined in the text and have a meaning that is likely to be different than what

the voter would understand them to mean. [FMA In. Br. 18-20.]

- The ballot summary is misleading for using the key phrases "medical doctor" and "three or more incidents" without defining them at all, and the phrases are not defined in the text, so that the summary is ambiguous and confusing to the voter. [FMA In. Br. 20-23.]

- The ballot summary omits material information such as the fact that legislative implementation will be required, that the practical effect of the amendment is likely to be that physicians will be forced to settle malpractice claims and thus keep their licenses, that none of the incidents of malpractice would have to occur in Florida, that de-licensure is possible as well as refusal to grant a license initially, and that past incidents of malpractice might not be considered. [FMA In. Br. 23-26.]

The sponsor in its Initial Brief does not address all of these flaws, not having had the benefit of opponents' initial briefs before preparing its own Initial Brief. Tellingly, however, the sponsor anticipated several of these problems and attempted, superficially and without success, to defuse them. A careful analysis of these arguments leads to the conclusion that this ballot title and summary fail the substantive legal tests, and must be stricken from the ballot.

A. The Ballot Title Is A Misleading Emotional Appeal Disconnected From The Chief Purpose Of The Amendment.

The sponsor's Initial Brief does not directly address this significant defect, but its discussion of the stated purpose and legal effect of the amendment clearly reveals that the phrase "public protection" is *not* part of that purpose and legal effect. Both the preamble and the text of the amendment provide that "The purpose of this amendment is to prohibit such a doctor [one who commits repeated malpractice] from obtaining or holding a license to practice medicine in Florida." The sponsor's Initial Brief repeatedly asserts that the purpose of the amendment is to prohibit licensure, rather than its emotional catch-phrase of "public protection." [Sponsor's In. Br. 24-26.] The sponsor includes several pages of campaign materials, illustrating the genesis of the political slogan used in the title. [Sponsor's In. Br. 2-6.] However, political or editorial commentary in a title or summary is not allowed. *See Evans v. Firestone,* 457 So. 2d 1351, 1355 (Fla.1984) (rejecting ballot summary that included "thus avoiding unnecessary costs" as an "editorial comment," and ruling that "the ballot summary is no place for subjective evaluation of special impact. … The political motivation behind a given change must be propounded outside the voting booth.").

The sponsor cannot, and does not, point to anything in the preamble or the text of the amendment that addresses "public protection." The fact is that no connection exists between the slogan used in the title, and the purpose and legal effect of the

amendment as stated in the text, and this alone is grounds to strike the amendment from the ballot. *See In re Advisory Op. to the Att'y Gen. – Save Our Everglades,* 636 So. 2d 1336, 1341 (Fla. 1994) (rejecting title that amounted to political slogan, using "legerdemain" of an emotional term, "save," in the title but a neutral term, "restore," in the text; and did not reflect text or legal effect of amendment); *Advisory Op. to Att'y Gen. re Casino Authorization, Taxation and Regulation*, 656 So. 2d 466, 469 (Fla. 1995) (rejecting as misleading a ballot title that used the word "authorization" while the summary used the word "prohibits"); *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982) (striking amendment that flew "under false colors" because of a misleading ballot title and summary).

B. The Ballot Summary Is Misleading In Several Respects.

Because the ballot summary opens with a declaration that current law allows doctors who commit repeated malpractice to keep practicing, the voter will think (incorrectly) that a "yes" vote is required to keep such doctors from practicing. The sponsor admits, however, that current law already allows the state to revoke physicians' licenses for repeated malpractice. [Sponsor's In. Br. 3-4 ("Under current Florida law, the Department of Health may revoke or suspend the license to practice medicine of any physician, … for 'gross or repeated malpractice' … .").] Yet the sponsor defends the opening statement of the ballot summary because, according to the sponsor, the opening statement is partially true as a result of what the sponsor

considers to be too-lenient enforcement of the current de-licensure standards. [Sponsor's In. Br. 25 (arguing that too few doctors have their licenses revoked although the law currently allows revocation for three malpractice incidents in five years).] In other words, because the first sentence in the ballot summary is true some of the time (according to the sponsor's statistics), the sponsor believes it is a fair and accurate way to describe the law to the voter: "Thus, voters are put on notice as to the state of current law … ." [Sponsor's In. Br. 25.]

Apparently the sponsor asks the Court to establish as the law of Florida that a ballot summary can include a representation of the current law that is "sometimes true," and that will be sufficient to meet the legal tests for ballot summaries. The Court must, of course, decline such an invitation and adhere to its longstanding requirements of truth, accuracy, and fairness in ballot summaries.

This ballot summary is not true, accurate, or fair. The sponsor failed to include within the ballot summary any reference to this new "sometimes true" principle, or even to state in general terms that current law *sometimes* allows physicians with repeated malpractice to continue to practice, *under some circumstances.* The sponsor asserts that these failures are permissible because the voter can be "assumed to know" how state executive agencies currently grant or deny medical licenses. [Sponsor's In. Br. 26.] This is not, however, something within the common understanding of the voter at all. Even the sponsor later admits that voters "are not presumed to have

special knowledge or legal expertise." [Sponsor's In. Br. 27 (citing *Tax Limitation*, 673 So. 2d at 868).] Knowledge of the workings of the Department of Health and Board of Medicine, or the statistical breakdown on percentage of physicians disciplined with license revocations, is not like the kind of common sense and knowledge that the Court in prior cases has said one must assume the voter possesses. *E.g., Advisory Op. to the Att'y Gen. re Tax Limitation,* 673 So. 2d 864, 868 (Fla. 1996) (voters understand that a simple majority prevails in an election); *Advisory Op. to the Att'y Gen. re Protect People from the Health Hazards of Second-Hand Smoke by Prohibiting Workplace Smoking,* 814 So. 2d 415, 418 (Fla. 2002) (voters cannot help but know that Florida has pre-existing legal restrictions on smoking).

In this case, voters cannot possibly be expected to have read or to know about the statistical study that the sponsors use for their campaign argument that current licensure regulation is insufficient in their view because some physicians are not disciplined as the sponsors think those physicians should be disciplined. The summary does *not* say, for instance, "Current law allows *some* medical doctors … to be licensed … ." The summary does *not* say, "Under current law *only X% of* medical doctors are disciplined for repeated malpractice." These examples are not presented to suggest that it would *ever* be proper to include a politically or emotionally loaded "hook" statement in a ballot summary, but rather to demonstrate that the sponsor's argument attempting to justify the accuracy of the ballot summary is meritless.

The sponsors' reliance on the "3 in 5" argument (that too few doctors lose their licenses even after committing three acts of malpractice in five years), and obscure statistical studies, is in effect an admission that the opening sentence of the summary is not a true and accurate representation of current Florida law. That should be the end of the inquiry: this amendment cannot be allowed to go on the ballot. *See Advisory Opinion to the Attorney General re Casino Authorization, Taxation and Regulation,* 656 So. 2d 466, 469 (Fla. 1995) ("the first line of the summary is misleading in that it suggests that the amendment is necessary to prohibit casinos in this state."); *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982) ("ballot summary neglects to advise the public that there is presently a complete two-year ban on lobbying before one's agency.").

2. *The Summary Is Ambiguous*.

The sponsor recognizes, as it must, that this amendment uses operative definitions "indicating implementing details which [sic] are essential to understanding the dimensions of the operative text." [Sponsor's In. Br. 22.] If, as the sponsor itself admits, the definitions are "essential" to understanding the text, why does the summary not even mention them?

The Court has held that ballot summaries must adequately define terms and adequately describe the operation of the amendment:

> [T]his Court has repeatedly held that ballot summaries which do not adequately define terms, use inconsistent terminology, fail to mention

> constitutional provisions that are affected, and do not adequately describe the general operation of the proposed amendment must be invalidated.

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, 899-900 (Fla. 2000). By the sponsor's own admission, this amendment uses defined terms that are "essential" to understanding the operation of the amendment, yet the summary neither defines them nor advises the voter to look to the text of the amendment to discern how they are defined. This failure renders the ballot summary clearly and conclusively defective, and the amendment should be stricken from the ballot.

(a) Failure to Disclose that Defined Terms Are Used, And That Their Meanings Are Not As Is Commonly Understood. The sponsor admits that summary uses the terms “medical malpractice” and “found to have committed,” which are specially defined in the text of the amendment. The sponsor, however, argues that it is not necessary to include definitions of these terms in the summary, because "the proposed amendment does not disturb the definitions of these factors in current law." [Sponsor's In. Br. 26.] FMA disagrees wholeheartedly. One need only compare the definition of "medical malpractice" under current law, to the definition set forth only in the text of this amendment, to prove the sponsor's statement wrong:

Current definition of "medical malpractice":	This amendment's special definition of "medical malpractice":

Breach of "that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers." § 766.102(1), Fla. Stat. (2003).	'Medical malpractice' means both the failure to practice medicine in Florida with that level of care, skill, and treatment recognized ***in general law related to health care providers' licensure*** … .

These definitions are not the same at all. The amendment injects licensure standards into the common law standards for showing malpractice, and thus works a broad change in the definition of "medical malpractice" when compared to the current standard for proving medical malpractice in a civil claim. The voter cannot possibly discern that change from reading the ballot summary.

Likewise, although the amendment uses the specially defined phrase "found to have committed," the ballot summary does not define it or even disclose that a special definition exists. The voter is not advised whether the "finding" must be made by a court, a jury, an agency, or an individual. The sponsor admits that this phrase is "somewhat technical," but defends its use and the failure to define it by saying that the defined terms "do not disturb the definitions of these factors in current law." [Sponsor's In. Br. 28.] This term, however, is not defined in current law, so this defense fails. After conceding that the amendment uses such operative phrases that are "essential" to understanding the amendment, the sponsor then contradicts itself by

claiming that "this is not a 'legal phrase' about which" the voters deserve to be informed. [Sponsor's In. Br. 28.]

The sponsor falls back on the voter's "common sense understanding of what constitutes a finding of medical malpractice under current laws." [Sponsor's In. Br. 28.] This defense fails because this amendment ***changes*** the definition of medical malpractice from current law, as demonstrated above; and because the voter has no way of knowing what kind of "finding," or by whom, will trigger the amendment. In fact, a finding of malpractice liability in a tort action may or may not constitute an "incident" of malpractice under this amendment, because the amendment's definition of malpractice incorporates "general law related to health care licensure."

The fact is that the phrase "found to have committed" is specially defined in the amendment because it is crucial to the operation of the amendment, yet is so broad and generic that it is utterly ambiguous. It could mean many different things, and the voter cannot be sure what it means. This kind of ambiguity in a central operative term renders the ballot summary clearly and conclusively defective.

(b) Use of Undefined Terms. The sponsor in its Initial Brief does not address the fact that the summary uses the ambiguous and undefined phrases "medical doctor" and “three or more incidents.” Because these phrases are central to the scope and operation of the amendment, because they are not defined under current law, and because they do not have a clearly understood common meaning, their use renders the

summary clearly and conclusively defective. Presumably, the sponsor will attempt to clear up these ambiguities in its Answer Brief and in response to the Court's questions at oral argument. One wonders, however, who will clear it up for the voters? The summary itself, which is all the voters will see in the voting booth, certainly does not do so.

3. ***The Summary Omits Material Information*****.** The sponsor fails to address the many material omissions from the summary, which include the necessity of legislative implementation,[1] the fact that incidents of malpractice need not have been committed in Florida in order to result in de-licensure, the fact that de-licensure is contemplated as well as a denial of licensure upon initial application, and that the amendment could apply retroactively to encompass acts of malpractice committed before passage of the amendment. It fails to reveal that its practical effect will be to pressure physicians into settling all claims, and thus thwart the purpose of the amendment because settling physicians may never be "found to have committed" malpractice as defined in the amendment.

While no summary is required to detail all of a proposed amendment's provisions or ramifications, the standard of fair and accurate disclosure demands that

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[1] *See Advisory Op. to Att'y Gen. re Right to Treatment and Rehabilitation,* 818 So. 2d 491, 498 (Fla. 2002) ("The sponsors reasonably may have determined that it would have been misleading to *fail* to mention the legislative implementation provision – and they would have been correct.") (emphasis added).

the voter be given enough information to make a fully informed decision. *E.g., Save Our Everglades,* 636 So. 2d at 1341. These key operative aspects of this amendment should have been disclosed in the summary, particularly considering that the sponsors could have used 30 more words and still complied with the statutory word limit. § 101.161(1), Fla. Stat. (2003).

II. THE AMENDMENT VIOLATES THE SINGLE-SUBJECT RULE.

The Amendment Substantially Alters or Performs the Functions of Multiple Branches of Government.

The sponsor expressly admits that this amendment performs executive branch functions because it mandates denial or revocation of licenses under certain circumstances, which otherwise would occur only upon the exercise of agency discretion. [Sponsor's In. Br. 13-16.] The sponsor denies that the amendment performs any judicial branch function. [Sponsor's In. Br. 16-17.] The sponsor admits that "[t]he proposed Public Protection amendment performs the legislative act of establishing the law in one limited area … ," but denies that the legislative functions rise to the level necessary to constitute substantially altering or performing a government function. [Sponsor's In. Br. 18.]

Upon objective examination, however, it is clear that this amendment violates the single-subject rule because it substantially affects multiple functions of government. [FMA In. Br. 26-32.] Because the law invalidates an initiative that substantially

performs or affects multiple branches of government, this amendment is clearly and conclusively defective and the Court must strike it from the ballot. *Treating People Differently*, 778 So. 2d at 892 ("'it is when a proposal substantially alters or performs the functions of multiple branches that it violates the single-subject test'") (quoting *Advisory Op. to Att'y Gen. re Fish and Wildlife Conservation Comm'n*, 705 So. 2d 1351, 1353-54 (Fla. 1998)).

Legislative Branch Functions. The sponsor admits that this amendment changes the policy of Florida: "It is a clear policy response to an identified problem … ." [Sponsor's In. Br. 10.] The sponsor admits that the proposed amendment changes Florida law, and that this is a legislative function: "The proposed Public Protection amendment performs the legislative act of establishing the law in one limited area … ." [Sponsor's In. Br. 18.] Those admissions alone are more than enough to support the conclusion that this amendment substantially alters or performs the legislative function.

The sponsor, however, then attempts to trivialize the effect of the amendment on the legislative branch function, arguing that the cumulative effect on the legislative function is insufficient to count as substantially altering or performing the legislative function. [Sponsor's In. Br. 19.] To support this argument, the sponsor asserts that the legislature will retain its discretion to enact general law consistent with the amendment, and can "expand or narrow the definition of malpractice." These

arguments are ineffective. First, as discussed above, the necessity of legislative implementation was not disclosed in the ballot summary in direct contravention of this Court's express holding that it should be disclosed. Second, the amendment itself defines malpractice, and the Legislature can never adopt a definition that contradicts the definition that this amendment will write in constitutional cement (without first changing the constitution). This amendment performs the legislative function far more substantially and conclusively than the sponsor admits. It substantially alters the entire legislative scheme for the licensure of the medical profession.

Executive Branch Functions. The sponsor admits that this amendment alters the executive branch function: "This change would be an alteration of the function of the executive branch of state government." [Sponsor's In. Br. 13-14.] It appears that the sponsor hopes to minimize this effect, however, arguing that the amendment merely "supplements" the agency's authority, "simply" requires the agency to "do something in addition to current law," "slightly alter the current statutory requirements," and apply "in a limited number of" cases. [Sponsor's In. Br. 15-16.] No matter how many minimizing adverbs are tacked on to the executive functions that this amendment usurps, the sponsor's initial admission is the correct assessment: this amendment usurps this executive function by providing an automatic de-licensing of any physician found to have committed the requisite number of incidents of malpractice, without regard to discretionary factors.

Judicial Branch Functions. The sponsor claims that this proposal has no effect whatsoever on the judicial branch and performs no judicial branch functions. [Sponsor's In. Br. 16-17.] The sponsor does not appear to have thought through the serious problem that arises because the amendment alters the common-law definition of medical malpractice to include licensure standards, but then purports to accept a civil-law "finding" of malpractice as satisfying the amendment's special definition of malpractice. [See FMA In. Br. 29-31.] That will not work in the real world unless civil litigants meet the "clear and convincing" standard of proof required for licensure revocation proceedings,[2] or the licensure revocation standard is reduced to the civil standard of a preponderance of the evidence. In either event, the amendment is usurping a judicial branch function. The amendment usurps another judicial function when it unilaterally imposes a statewide Florida standard of care (a question of fact to be determined in civil litigation) on non-Florida acts.[3] Thus, the sponsor is wrong when it asserts that the proposed amendment does not change the standards courts use. [Sponsor's In. Br. 16.] This amendment usurps core judicial branch functions.

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[2] *See Ferris v. Turlington,* 510 So. 2d 292, 294-95 (Fla. 1987) (requiring clear and convincing evidence for any penal sanction).

[3] *See, e.g., Amente v. Newman,* 653 So. 2d 1030, 1031-32 (Fla. 1995) (recognizing that question in medical malpractice cases is whether the doctor exercised a standard of care commensurate with that used in the community); *Couch v. Hutchison,* 135 So. 2d 18, 19-20 (Fla. 2nd DCA 1961) (same "locality rule").

This amendment substantially alters or performs the functions of more than one branch of government, thereby violating the single-subject rule. The Court should strike it from the ballot.

CONCLUSION

The Court should strike this amendment from the ballot because its ballot title and ballot summary fail to comply with the applicable legal standards, and because the amendment violates the single-subject rule by substantially altering or performing the functions of more than one branch of government.

Respectfully submitted this 1st day of June, 2004.

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