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

INITIAL BRIEF OF THE FLORIDA DENTAL ASSOCIATION

IN OPPOSITION TO THE INITIATIVE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

THE PROPOSED INITIATIVE vi

STATEMENT OF THE CASE viii

PRELIMINARY STATEMENT viii

STANDARD OF REVIEW 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

1. The Proposed Amendment Should Be Rejected Because It Violates The Single Subject Requirement BY Substantially Impacting More Than One Governmental Function. 5

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. 14

A. The Ballot Title Misleads The Voters By Giving The Impression The Public Needs To Be "Protected" From The Dangers Of Repeated Medical Malpractice. 15

B. The Ballot Summary Misleads The Voters By Inaccurately Describing The Current State Of The Law on Physician Discipline. 20

C. The Ballot Title And Summary Do Not Properly Inform The Voter Of The Meaning Of The Actual Terms In The Summary. 23

CONCLUSION 26

CERTIFICATE OF COMPLIANCE RE: TYPEFACE 26

CERTIFICATE OF SERVICE 27

TABLE OF AUTHORITIES

CASES

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 (Fla. 2000) 2

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 (May 13, 2004) 1

Advisory Op. to Att'y Gen. re:
Casino Authorization, Taxation and Regulation,
656 So.2d 466 (Fla. 1995) 21

Advisory Op. to Att'y Gen. re:
Fee on Everglades Sugar Prod.,
681 So.2d 1124 (Fla. 1996) 15

Advisory Op. to the Att'y Gen. re:
Fish & Wildlife Conservation Comm'n,
705 So.2d 1351 (Fla. 1998) 1,2,5,23

Advisory Op. to Att'y Gen. -
Limited Political Terms in Certain Elected Offices,
592 So.2d 225 (Fla. 1991) 15

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 (Fla. 1997) 2,13,23

Advisory Op. to Att'y Gen. re: Protect People
from the Health Hazards of Second-Hand
Smoke by Prohibiting Workplace Smoking,
814 So.2d 415, 421 (Fla. 2002) 18

Advisory Op. to Att'y Gen. re:
Requirement for Adequate Public Education Funding,
703 So.2d 446 (Fla. 1997) 2,13

Advisory Op. To Att'y Gen. re:
Restricts Laws Related to Discrimination,
632 So.2d 1018 (Fla. 1994) 23

Advisory Op. to the Att'y Gen. re:
Right for Citizens to Choose Health Care Providers,
705 So.2d 563 (Fla. 1998) 2,15

Advisory Op. to the Att'y Gen. - Save Our Everglades,
636 So.2d 1336 (Fla. 1994) 2,13,15,16,18

Advisory Op. to the Att'y Gen. re:
Stop Early Release of Prisoners,
642 So.2d 724 (Fla. 1994) 2

Advisory Op. to the Att'y Gen. re: Term Limits Pledge,
718 So.2d 798 (Fla. 1998) 2,14,23

Advisory Op. To Att'y Gen. re: Tax Limitation,
644 So.2d 486 (Fla. 1994) 15,22

Advisory Op. to the Att'y Gen. re:
Voluntary Universal Pre-Kindergarten Educ.,
824 So.2d 161 (Fla. 2002) 5,6

Askew v. Firestone,
421 So.2d 151 (Fla. 1982)) 1,4,19,20,23

Department of Banking and Finance,
Div. of Sec. and Investor Protection v.
Osborne Stern and Co.,
670 So.2d 932 (Fla. 1996) 9

Evans v. Firestone.
457 So.2d 1351 (Fla. 1984) 12,14

Ferris v. Turlington,
510 So.2d 292 (Fla. 1987) 9-11,13

Fine v. Firestone,
448 So.2d 984 (Fla. 1984) 6

Gooding v. University Hospital Bldg, Inc.,
445 So.2d 1015 (Fla. 1984) 10

Hill v. Millender,
72 So.2d 796 (Fla. 1954) 14

*In Re Advisory Op. To the Att'y Gen. -
Restricts Laws Related To Discrimination*,
682 So.2d 1018 (Fla. 1994) 6

Kozerowitz v. Fla. Real Estate Comm'n,
289 So.2d 391 (Fla. 1974) 8,9

*Lester v. Department of Prof. and Occupational Reg.,
State Bd. of Med. Examiners*,
348 So.2d 923 (Fla. 1st DCA 1977) 9

Smith v. American Airlines,
606 So.2d 618 (Fla. 1992) 15,19

State ex. rel. Vining v. Fla. Real Estate Comm'n,
281 So.2d 487 (Fla. 1973) 9

CONSTITUTIONAL PROVISIONS

Art. XI, § 3, Fla. Const. 5,25

STATUTES

§ 101.161(1), Fla. Stat. (2003) 4,14,22,25

§ 456.072(2)(a), Fla. Stat. (2003) 8

§ 456.072(2)(b), Fla. Stat. (2003) 8

§ 458.301, Fla. Stat. (2003) 7,20

§ 458.307, Fla. Stat. (2003) 8

§ 458.311, Fla. Stat. (2003) 7

§ 458.313, Fla. Stat. (2003) 7

§ 458.331, Fla. Stat. (2003) 7

§ 458.331(1)(t), Fla. Stat. (2003) 8,16

§ 458.331(2), Fla. Stat. (2003) 8

§ 458.331(3), Fla. Stat. (2003) 10

RULES AND OTHER AUTHORITIES

Rule 64B8-8.001, Fla. Admin. Code 8

Rule 64B8-8.001(2), Fla. Admin. Code 16,20

Fla. St. Jury Instr. 3.7 10

THE PROPOSED INITIATIVE

The Title of the proposed amendment is "Public Protection From Repeated Medical Malpractice."

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

> Current law allows medical doctors who have committed repeated malpractice to be licensed to practice 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 actual initiative provides:

a) Statement and Purpose

Under current law, a medical doctor who has repeatedly committed medical malpractice in Florida or while practicing in other states 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.

"c) 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 of

law, final administrative 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 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 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 the 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 terms 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 (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 and 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 constitutional or statutory requirements for ballot initiatives.

First, it does not comply with the single subject-subject requirement because it substantially impacts several different government functions. The proposal would overrule the legislative branch of government by creating a new law requiring that doctors who are "found to have committed" malpractice on three occasions be prohibited from ever practicing medicine in Florida again. It will also substantially impact the executive function of our state government by removing any and all discretion vested with the Board of Medicine to determine

whether a physician poses a threat commensurate with license revocation. Finally, this amendment would effectively overrule the carefully considered, judicially imposed burden of proof in license revocation cases. This Court has required that in order to take away a professional license, the State must prove "substantial" conduct warranting such action by clear and convincing evidence. The amendment would not require "substantial" conduct, and it would permit the proof of whatever conduct there was to be proven by the more likely than not, or preponderance of the evidence, standard.

This Court has made it clear that an amendment cannot stand when it impact 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. The Title "Public Protection From Repeated Malpractice" is misleading because 1) it infers the public is not already protected, when it is; and 2) the amendment itself says nothing at all about "protecting the public." The focus of the amendment is to preclude such doctors from ever practicing in Florida, a purpose infinitely more narrow than "public protection."

The Summary is likewise defective. It misstates the current state of the law by claiming it "allows medical doctors who have committed malpractice to be licensed to practice medicine in Florida." This improperly suggests to the voters that there is no discipline system in place to protect them from such doctors. It encourages a false choice between having to face dangerous doctors and voting for an amendment that will give them protection. This is improper because there are already laws and administrative rules in place to ensure that physicians who pose a threat to Floridians are not permitted to practice here. The Summary also fails to define critical terms of the amendment. These defects are fatal to the amendment, and it must be rejected.

ARGUMENT

1. The Proposed Amendment Should Be Rejected Because It Violates The Single Subject Requirement By Substantially Impacting More Than One Governmental 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 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 all three branches of Florida's government. The apparent purpose[2] of this amendment is to establish a bright line rule that no medical provider who has been found guilty of three incidents of medical malpractice be permitted to be licensed in the State of Florida. There are several government functions which already deal with licensing physicians and determining when, and if, their licenses should be revoked.

Legislative Impact

The legislature has already established basic qualifications for licensure, § 458.311, Fla. Stat. (2003), because it "recognizes that the practice of medicine is potentially dangerous to the public if conducted by unsafe and incompetent

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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.

[2] It is the "apparent purpose" because, as will be discussed *infra*, the Title and Summary are not very clear on this.

practitioners." § 458.301, Fla. Stat. (2003). It has expressly acknowledged the importance of ensuring physicians coming to Florida do not pose a threat to the public. *Id.*; § 458.313, Fla. Stat. (2003)(setting forth standards for out-of-state physicians seeking to practice in Florida). In furtherance of this primary goal, the legislature has established laws to provide for the discipline, including license revocation, of Florida physicians who do not practice medicine safely. § 458.331, Fla. Stat. (2003). The proposed amendment would significantly restrict the legislative participation in this area by essentially replacing the "wisdom" of this amendment for that of the legislature.[3]

[3] The FDA understands that if the impact ended there, the amendment would be constitutional. Amendments, by their very nature, often conflict with existing laws. If nothing was intended to be changed, there would be no purpose of amendments. However, amendments cannot substantially alter more than one government function.

Executive Branch Impact

The government involvement in ensuring physicians are qualified does not end with the legislature. The Board of Medicine, § 458.307, Fla. Stat. (2003), exists to enforce the provisions of Chapter 458. § 458.309, Fla. Stat. (2003). The Board is charged with disciplining physicians who are guilty of, among other things, repeated malpractice. § 458.331(1)(t), Fla. Stat. (2003). The Board is authorized to revoke the license of such physicians if necessary. § 458.331(2), Fla. Stat. (2003); § 456.072(2)(a) and (b), Fla. Stat. (2003).

In its capacity as an executive agency, the Board of Medicine has adopted rules to put the legislature's public policy of protecting the public from unsafe doctors into practice. Ch. 64B8, Fla. Admin. Code. The Rules include recommended ranges of punishments which should be imposed on physicians, including those who are guilty of repeated malpractice. Rule 64B8-8.001, Fla. Admin. Code. Clearly, the proposed amendment would intrude upon this executive function of the government by mandating the specific punishment for physicians who have been found guilty of three incidents of medical malpractice.

Judicial Impact

The amendment also substantially impacts the function of the judiciary. This Court has long held that license revocations are penal in nature. *Kozerowitz v. Fla. Real Estate Comm'n*, 289 So.2d 391 (Fla. 1974); *State ex. rel. Vining v. Fla. Real Estate Comm'n*, 281 So.2d 487, 491 (Fla. 1973). *See also Lester v. Department of Prof. and Occupational Reg., State Bd. of Med. Examiners*, 348 So.2d 923, 925 (Fla. 1st DCA 1977)(holding the Medical Practice Act is penal in nature because it involves potential loss of license). This Court has required that concomitant strict procedural protections apply to such cases. The "clear and convincing" standard of proof must be applied to any action to take away someone's professional license. *Ferris v. Turlington*, 510 So.2d 292, 294-95 (Fla. 1987)("[P]enal sanctions should only be directed toward those who by their conduct have forfeited their right to the privilege, and then only upon clear and convincing proof of *substantial causes* justifying their forfeiture.")(Emphasis in original)(citation omitted).[4]

[4] This Court has refused to extend this clear and convincing standard to license applications, but it remains for license revocations. *Department of Banking and Finance, Div. of Sec. and Investor Protection v. Osborne Stern and Co.*, 670 So.2d 932, 934 (Fla. 1996). Thus, the impact of the amendment is greater as it relates to licensed doctors than to applicants.

This holding shows two separate ways in which the proposed amendment interferes with the judiciary. First, it changes the standard of proof this Court has held must be applied to license revocation proceedings. The amendment requires that a physician's license be revoked if he or she has thrice been "found to have committed" malpractice. They are considered to have been "found to have committed" malpractice if "malpractice has been found in the final judgment of a court of law, final administrative action, or a decision of binding arbitration." Of these potential adjudicators of malpractice, only the administrative agency (at least in Florida) is governed by the "clear and convincing" proof standard in cases involving potential license revocation. § 458.331(3), Fla. Stat. (2003).[5] The judgment of malpractice in a court would be based on the preponderance of the evidence, or more likely than not, standard. *See Gooding v. University Hospital Bldg, Inc.*, 445 So.2d 1015, 1018 (Fla. 1984); Fla. St. Jury Instr. 3.7.[6]

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[5] Of course, this would not matter in cases where the Department of Medicine was prosecuting a case in which it did not seek such a remedy, because the first two "strikes" could be adjudicated on the preponderance standard, yet form the underlying basis for revocation upon the third "finding" of malpractice.

[6] While the instruction refers to "greater weight of the evidence," it means the same thing. See n. 2. Both are standards less than the one required by this Court in *Ferris*.

Presumably, the same would be true of an arbitration panel, as it would be applying the civil negligence standard in its consideration of a case.

The practical result of these varying standards of proof means a physician could lose his license based purely on malpractice "findings" based on a lower level of proof than the one recognized by this Court as being necessary to "implicate the loss of livelihood" which cases require "an elevated standard [of proof] . . . to protect the rights and interests of the accused." *Ferris*, 510 So.2d at 295.

For example, a physician found to have committed malpractice by three juries would be subject to license revocation. Whatever agency charged with implementing the amendment would be required to permanently revoke the doctor's license. This would occur despite the fact that all three incidents in which the doctor was "found to have committed malpractice" were determined based on the more likely than not standard, rather than the clear and convincing evidence standard required by this Court.

The judiciary is also impacted because the common law principles identified in *Ferris* are effectively overruled in terms of the degree of offense required to take away someone's license. The amendment provides that *any* three findings of malpractice require license revocation. In other words, three

minor findings[7] of malpractice over a 20, 30 or 40 year practice would require the Board of Medicine (presumably in charge of implementing this amendment) to take away a doctors license. This flies in the face of *Ferris*, which held that only those against whom "substantial causes" justifying such action be subject to license revocation. *Id.* The example cited above cannot be suggested to rise to the level of "substantial causes."[8] Yet, the doctor in that case would lose his license.

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 1352, 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

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[7] It matters not whether these were established by clear and convincing evidence. The important thing is that they could be minor incidents that would not reasonably suggest that the physician poses a threat to the public.

[8] There is no control at all over the level of threat associated with the license revocation. While an agency could exercise discretion on minor malpractice issues, there is no similar check on malpractice as found by juries. Indeed, it would be possible for patients and lawyers to simply force minor mistakes to judgment three times to force a doctor to lose his license. Under no circumstances can that be considered a "substantial cause" as defined by this court.

$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). *See also Requirement for Adequate Public Education Funding*, 703 So.2d at 450 (amendment defective because it "does substantially affect more than one function of government and multiple provisions of the Constitution."); *People's Property Rights*, 699 So.2d at 1308 (amendment defective because of "substantial impact on both the legislative and executive branches of government.")

There is no reason to treat this proposed amendment any differently than the ones that failed in *Evans, Public Funding, or People's Property Rights*. Indeed, the violation in this case is worse because it impacts all three branches of government.

Compare Save Our Everglades, 636 So.2d at 1340 (amendment defective because "the initiative performs functions of each branch of government").

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 legislature has taken its job of protecting the citizens of Florida very seriously. So has the executive, via the Board of Medicine. Certainly, this Court's holding in *Ferris* cannot be dismissed as irrelevant. It is an important judicial holding establishing that Floridians, even doctors, should not suffer the "loss of livelihood" without "clear and convincing proof of substantial causes justifying their forfeiture." 510 So.2d at 295. The effect on these governmental functions is substantial, and requires that the amendment be rejected.

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,* 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 Misleads The Voters By Giving The Impression The Public Needs To Be "Protected" From The Dangers Of Repeated Medical Malpractice.

A misleading Title is a fatal defect in a ballot initiative and warrants that it be stricken. *See Save Our Everglades*, 636 So.2d at 1341. In that case, the proponents prepared an amendment designed to tax the sugar industry to pay for Everglades restoration. However, the Title of the ballot did not refer to restoration; it was called "Save Our Everglades." This Court noted that the Title was misleading because "[i]t implies that the Everglades is lost, or in danger of being lost, to the citizens of our State, and needs to be 'saved' via the proposed amendment." *Id*. The Title in this case is similarly

defective. The Title is misleading by simply saying "Public Protection from Repeated Malpractice." Just as the initiative in *Save Our Everglades* suggested, falsely, that the Everglades were in danger "of being lost," this Title suggests, falsely, that the public in Florida needs to be "protected" from repeated malpractice. It suggests the public in Florida is not already protected from repeated malpractice. This is simply not true. Florida law expressly grants the Board of Medicine authority to discipline physicians and protect the public from repeated malpractice. § 458.331(1)(t), Fla. Stat. (2003). Florida Administrative Code Rule 64B8-8.001(2) provides that physicians found guilty of repeated malpractice (even less than three incidents) should be punished by from three years probation to revocation/denial for a first offense, to suspension or revocation/denial for a second offense, along with other consequences. Thus, the public is already being "protected" from repeated malpractice.

There is also no logical connection between the Title of the initiative and the actual amendment. The Title "Public Protection From Repeated Malpractice" does not logically flow into an amendment which only requires that doctors not be permitted to practice in Florida after three malpractice findings. "Protection" can come in many ways. It can involve

the creation or modification of a disciplinary body (which exists). It can involve additional education and training requirements for doctors. It can involve limiting the number of patients seen by doctors to give them more time with each patient, or restricting the type of services the doctors can offer. It can involve placing those "found" to have committed malpractice to practice under suspension or supervision. The options available to "protect" the public are limited only by one's imagination.

However, this amendment involves none of those potential "protections." It involves a single requirement: that the license be revoked from doctors with three "findings" of malpractice at any time and in any place. One must wonder then, why the Title does not simply say what the amendment actually does? Why does it not simply say "License Revocation Requirements For Physicians," "Increased Penalties for Negligent Doctors," or something similar? Those would at least somewhat accurately describe the amendment. The current Title does not even come close to describing what the amendment really does.

The Title of this amendment is nothing more than a political tag line, designed to evoke an emotional response from voters. By implying that Florida citizens are not already "protected," and then offering such "protection," the sponsors seek to have

voters choose based on their emotion rather than based on the merits of the cause. This Court refused to allow such emotional pandering in *Save Our Everglades*, because "[a] voter responding to the emotional language of the title could well be misled as to the contents and purpose of the proposed amendment." 636 So.2d at 1341. It should do the same thing here.

Before moving on, the FDA notes that this Court has previously allowed an initiative Title which contained language claiming to "protect" the public from the "hazards" of smoking. *Advisory Op. to Att'y Gen. re: Protect People from the Health Hazards of Second-Hand Smoke by Prohibiting Workplace Smoking*, 814 So.2d 415, 421 (Fla. 2002). However, that holding does not apply here. First, in that case the Title did track the language of the summary and amendment.[9]

Second, the language in *Health Hazards* was a more accurate description of what the amendment in that case did. The purpose of the amendment was, indeed, to protect the public from the dangers of second-hand smoke by prohibiting workplace smoking.

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[9] The amendment itself does not even contain the words "protection of the public." The "Statement and Purpose" of the amendment explains "The purpose of this amendment is to prohibit such a doctor from obtaining or holding a license to practice medicine in Florida." While this might be one form of "public protection," it does not accurately represent the term completely.

While it could be argued that the degree to which the public needed “protection” was arguable, the debate about the effects of second hand smoking have dominated the public airwaves for much of the past two decades. Any reasonably informed voter would be aware of the pros and cons to the argument. The same cannot be said of the issue in this amendment. Few Floridians would inherently know about the degree to which the legislature and the Board of Medicine already protect them from repeated malpractice. They should be given that information before they are expected to vote. *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.”).

In the end, the Title here is a political claim, not a fair description of the amendment itself. If the proponents want to argue outside the voting booth that this measure would provide “public protection from repeated malpractice,” that would be fine. They have a First Amendment right to make that claim. However, they do not have the right to add this editorial comment inside the voting booth by using a misleading Title that

does nothing more than make their argument for them. *See Evans*, 457 So.2d at 1355. This defective Title is a fatal flaw to this amendment, and it should be rejected.

B. The Ballot Summary Misleads The Voters By Inaccurately Describing The Current State Of The Law on Physician Discipline.

The Summary is likewise defective. The opening line alleges "Current law allows medical doctors who have committed repeated malpractice to be licensed to practice medicine in Florida." This is a very vague, and even misleading, statement. While it might be technically true that some physicians can hold a license in Florida after being "found to have committed" three incidents of malpractice, Florida law does not simply "allow" them to practice here. A physician with that history would be subject to serious discipline by the Board of Medicine. Rule 64B8-8.001(2), Fla. Admin. Code. If there were evidence that the physician posed a threat to the public, it is likely he or she would lose their license. Indeed, it is the stated public policy that "physicians who fall below minimum competence or who otherwise present a danger to the public *shall be prohibited from practicing* in this state." § 458.301, Fla. Stat. (2003)(Emphasis added).

The Summary suffers the same flaw from which the Title suffers: it is nothing more than a political argument. Just as

this Court has refused to approve initiatives with such Titles, it has rejected initiatives with such Summaries. For example, in *Askew*, the Summary said the amendment would "prohibit former legislators and statewide elected officers" from lobbying for two years unless information required by the amendment was disclosed. While this seemed like a good idea, it was misleading because at the time of the proposal such officials were already prohibited from lobbying for those two years. 421 So.2d at 153. In other words, the language of the Summary effectively misrepresented the current state of the law. It suggested that the amendment was needed to limit lobbying, but it was not. Nor is the amendment in this case "needed" to ensure that physicians who commit three acts of malpractice and are a danger to the public are prevented from practicing in Florida.

This Court struck an initiative for the same reason several years later. *Advisory Op. to Att'y Gen. re: Casino Authorization, Taxation and Regulation*, 656 So.2d 466 (Fla. 1995). There, the Summary provided "This amendment prohibits casinos unless approved by the voters" of any county, taxing authority or other local body. *Id.* at 467. Of course, at that time most casinos were already prohibited by statute. The real purpose of the amendment was to allow local entities to decide

on their own whether to allow casinos. The real effect of the amendment was to restrict the legislature's power to prohibit casinos state-wide. However, the summary did not suggest this; it suggested that "the amendment was necessary to prohibit casinos in this state," and it "gives the false impression that casinos are now allowed in Florida" by failing "to inform the voter most types of casino gaming are currently prohibited by statute." *Id.* This was the same fatal defect that existed in *Askew*.

The Summary in this case is no different. It improperly describes the current state of the law, and fails to inform the voters that there already exist laws and substantial administrative procedures to deal with physicians who are found guilty of multiple incidents of malpractice. It suggests to them that there are not currently laws and regulations in place to protect the public, and therefore it is necessary to vote for this amendment if they want to be "safe." *Compare Tax Limitation*, 644 So.2d at 494 (initiative was misleading "because it implies there is presently no cap or limitation on taxes . . . when, in fact, there is. . .").

A fair and accurate Title and Summary in this case would not imply to voters that there is no current protection available to the public. It would not pretend that the stated public policy

of the Florida legislature that physicians who pose a threat to the public not be licensed did not exist. A more accurate description would be that "Current law provides for physicians to be seriously disciplined, including license suspension or revocation by the Board of Medicine, but the Board has the discretion to allow such physicians to remain licensed in Florida . . ."[10] This Summary would be complete, and would not force voters to wonder if they will be left wholly "unprotected" if they do not vote "Yes" at the polls. Of course, few people would vote "Yes" to this type of amendment if they knew they were already substantially protected from this concern.

This Summary is, at best, ambiguous. This Court "cannot approve an ambiguity that will in all probability confuse the voters who are responsible for deciding whether the amendment should be included in the state constitution." *Advisory Op. To Att'y Gen. re: Restricts Laws Related to Discrimination*, 632 So.2d 1018, 1021 (Fla. 1994). A ballot summary can be defective, or ambiguous, 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

[10] This would add only 16 words. The current summary is 30 words short of the maximum. § 101.061(1), Fla. Stat. (2003).

voters that they are already protected by Florida law and the Board of Medicine. "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. Thus, this amendment should be stricken.

C. The Ballot Title And Summary Do Not Properly Inform The Voter Of The Meaning Of The Actual Terms In The Summary.

The ballot Title and Summary must clearly inform the voter what the amendment will do if adopted. This Court has rejected initiatives where the language in the Title and Summary were insufficient to tell the voter this information. *People's Property Rights*, 699 So.2d at 1309. There, Title and Summary were defective because the term "common law nuisance" was not defined and the term "loss in fair market value, which in fairness, should be borne by the public," was too vague because the notion of "fairness" is subjective.

The pending ballot initiative will require voters to choose on a constitutional amendment without sufficient knowledge of the meaning of the terms therein. The primary defect in this regard lies with the language "found to have committed three or more incidents of medical malpractice." The voter, however, is not told that these "findings" may be by administrative agency

or jury, and is not informed that the standard of proof required in Florida in license revocation cases is effectively repealed by the proposal. See Argument, pp. 9-14, *supra*.

Conversely, reasonable voters with any familiarity with the existing administrative scheme for license discipline could read the summary as simply providing that any physician "found to have committed" three acts of malpractice would be subject to revocation by the Board of Medicine. These voters would likely assume that the same procedural protections that have always applied would apply to this, also. In other words, they could reasonably read the summary to mean that if a physician were found *by clear and convincing evidence* to have been guilty of malpractice in three incidents, he would lose his license. There is nothing in the Summary to suggest the truth: that the amendment would require revocation of a doctor's license if found guilty by juries based on the more likely than not standard. Voters have no information at all in this Summary to inform them that they are changing the entire burden of proof required to take away a doctor's license. This ambiguity cannot be permitted, and the voters should not be put in a position to do this unintentionally.

There are other problems with failure to define terms in this amendment. Both the Summary and the amendment itself use

the term “three or more incidents.” These terms are left undefined. Voters cannot know whether a physician can have his/her license revoked for the same conduct or whether it would require three discrete acts at different times and/or with different patients. For example, if a doctor was alleged to have been guilty of malpractice for failing to obtain informed consent and also providing care below the prevailing standard of care, would that be two “incidents?” If that same physician was successfully sued and then disciplined by the Board of Medicine, would it be two, or even three, incidents? No one knows. No one can say what they would be, because this central term is left undefined. When the citizens of Florida are asked to vote on something that has the potential to restrict other citizens’ right to engage in a profession for which they spent years and hundreds of thousands of dollars, it is incumbent upon this Court to ensure they know the details upon which they are voting. The only way to do that is to reject this amendment.

CONCLUSION

The Public Protection Against Repeated Malpractice 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.

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 those identified on the following list of counsel.

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