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

INITIAL BRIEF OF OPPONENT, FLORIDA MEDICAL ASSOCIATION, INC.

HOLLAND & KNIGHT LLP
Stephen H. Grimes
Susan L. Kelsey
P.O. Drawer 810
Tallahassee, FL 32302
Counsel for FMA

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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

This amendment is clearly and conclusively defective, and the Court should strike it from the ballot.

The ballot title uses the emotional phrase of "public protection," which is blatant and improper campaigning. The phrase appears nowhere else in either the ballot summary or the full text of the amendment. To the contrary, after starting out with the political "bang" of that phrase, both the summary and the amendment use neutral language to describe the chief purpose and legal effect of the amendment – without so much as mentioning "public protection." This leaves the title standing alone, disconnected from the text of the amendment, preying on emotions, and thus misleading to the voters.

The ballot summary is grossly misleading by stating that "Current law allows" medical doctors to keep their licenses in spite of repeated malpractice. At best, this is a half-truth serving a deception. It misrepresents the current state of the law, which already provides that physicians who are incompetent or dangerous shall not practice in Florida, and which already allows for revocation or suspension of licenses for repeated malpractice. The summary beguiles the voter into thinking a "yes" vote is required to accomplish what present law already accomplishes.

The ballot summary is misleading for the additional reasons that it fails to advise the voter that the amendment uses specially defined terms, "medical malpractice" and "found to have committed," which are defined in a manner different

than what the average voter might think they mean. The summary is misleading because it uses other terms, "medical doctor" and "three or more incidents," that are not defined anywhere in the amendment and are susceptible to such varying interpretations that it is impossible to determine definitively what they mean in this amendment. Finally, the ballot summary is misleading because it omits important operational elements of the amendment that are necessary for the voter to know in order to make an intelligent and informed decision. The summary does not disclose that none of the incidents of malpractice that would preclude licensure in Florida would have to have occurred in Florida. Moreover, the summary does not comply with this Court's requirement that the voters be advised when legislative action will be necessary to implement the amendment. *Advisory Op. to Att'y Gen. re Right to Treatment and Rehabilitation*, 818 So. 2d 491, 498 (Fla. 2002).

The amendment violates the single-subject rule by substantially altering or performing the functions of more than one branch of government. It substantially alters the entire legislative scheme for licensure of medical professionals, and substitutes its own policy choices for the policy choices that the legislature already has made and otherwise would continue to make in this field. It usurps the executive function of the practice boards such as the Board of Medicine, by automatically de-licensing certain health care providers and divesting the boards of their authority and discretion in dealing with negligence cases. Finally, the drafters of this amendment elevate themselves to judge and jury, performing the judicial functions of requiring new standards of care and burdens of proof in malpractice lawsuits; and eliminating the

locality rule for standards of care by imposing the Florida standards on acts committed in other states or countries.

This amendment should not reach the ballot.

ARGUMENT

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

The Court considers the ballot title and the ballot summary together to determine whether the title and summary are clear and unambiguous, whether they state the primary purpose and legal effect of the amendment itself, and whether they are accurate, informative, and not misleading. *Advisory Op. to the Att'y Gen. re Voluntary Universal Pre-Kindergarten Education*, 824 So. 2d 161, 166 (Fla. 2002). The legal standards for a ballot title and summary are intended to ensure that "the voter will have notice of the issue contained in the amendment, will not be misled as to its purpose, and can cast an intelligent and informed ballot." *In re Advisory Op. to the Att'y Gen. – Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994). In this case both the ballot title and the ballot summary fail to meet the substantive legal standards, and as a result the Court should strike the amendment from the ballot.

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

The ballot title, "Public Protection From Repeated Medical Malpractice," satisfies the applicable technical requirements.[1] The ballot title fails, however, to satisfy the substantive requirements to which this Court adheres. The Court has stricken previous proposals because their ballot titles were misleading and preyed on emotion, and should do so again here.

In *Save Our Everglades*, the ballot title consisted of those three words. The text, although referring to a trust fund named with the same three words, did not address "saving" anything. Instead, it discussed how the amendment would "restore" the Everglades Ecosystem and "recreate" its historical ecological functions. 636 So. 2d at 1338. The Court rejected the ballot title because it was disconnected from the text of the amendment, and was an emotional appeal that could mislead voters as to the real purpose and effect of the amendment:

> The title … 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. Yet, nothing in the text of the proposed amendment hints at this peril. … Further, the text of the amendment clearly states that the purpose of the amendment is to "restore" the Everglades to its original condition, not to "save" it from peril. A voter responding to the emotional language of the title could well be misled as to the contents and purpose of the proposed amendment.

Save Our Everglades, 636 So. 2d at 1341.

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[1] The ballot title must be "a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of." § 101.161(1), Fla. Stat. (2003).

The Court rejected *Save Our Everglades* because it was guilty of "the legerdemain of employing an emotional term ('save') in the ballot title or summary while substituting a more docile term ('restore') in the amendment text." (discussed in *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)). *see also 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"). Yet that "legerdemain" is precisely what the present amendment uses.

This amendment suffers from the same disconnection between title and text, and the same misleading emotional appeal, that were fatal in *Save Our Everglades*. Although the title proclaims "Public Protection," nothing in the text of the amendment, nor even in the ballot summary, so much as mentions the public or how it will be "protected" from anything. To the contrary, the summary and text of the amendment both state that its purpose and legal effect are to prohibit the licensure of certain medical doctors.

This proposal relies entirely on the rhetoric of its title to persuade voters to assume what is not stated anywhere in the summary or the text; i.e., that the licensure restrictions will in fact offer some sort of unspecified "protection" to the public. The Court rejected the *Save Our Everglades* title and summary because they were "a subjective evaluation of the impact of the proposed amendment as opposed to a summary of the legal effect … ." *see Workplace Smoking*, 814 So. 2d at 421. Blatant

political rhetoric unconnected to the chief purpose and legal effect of the amendment as stated in the text thereof is alone grounds to strike it from the ballot. *Save Our Everglades*, 636 So. 2d at 1341; *see also 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).

It appears that the sponsor of the present amendment hoped to avail itself of this Court's approval of another ballot title that used the phrase "protect people," in the recent workplace smoking amendment; but such reliance would be misplaced. In the *Workplace Smoking* case, opponents of the amendment argued (vigorously) that it suffered from the same flaw that condemned the *Save Our Everglades* proposal, in that its use of the words "protect" and "hazards" were impermissible political or inflammatory rhetoric. *See Workplace Smoking*, 814 So. 2d at 420. Unlike *Save Our Everglades* or the present amendment, however, the *Workplace Smoking* amendment took care to ensure that the title exactly mirrored both the ballot summary and the text of the amendment. *Workplace Smoking*, 814 So. 2d at 416. The Court distinguished *Workplace Smoking* from *Save Our Everglades* because the use of the words "protect" and "hazards" in the *Workplace Smoking* title accurately reflected the summary and text of the amendment, and the title and summary were accurate and not misleading. 814 So. 2d at 421-22.

Similarly, two of the sugar-tax-related amendments from 1996 used the phrase "conservation and protection" in their ballot summaries (although *not* in their titles), but the Court approved them because the exact same phrase appeared in the full text of

the amendment. *Advisory Op. to Att'y Gen. – Fee on the Everglades Sugar Production*, 681 So. 2d 1124, 1127-29 (Fla. 1996) (the "Sugar Tax" and "Everglades Trust Fund" amendments). The rule that emerges from these cases is that a bare political, emotional, or rhetorical phrase in a ballot title that does not reflect the text of the amendment is impermissible because it does not disclose the chief purpose and legal effect of the amendment.

In short, the *lack* of a direct and accurate connection between the title and text renders the title misleading. That was what was wrong with the *Save Our Everglades* title. Like the emotional rhetoric that the Court rejected in the *Save Our Everglades* title, the amendment now before the Court uses the clarion call of "public protection" in its title, standing alone, and not reflecting anything that appears in either the summary or the text of the amendment. 636 So. 2d at 421.

The following table compares the cases, showing that this amendment is clearly defective because of its misleading disconnection between title and text:

Amend-ment	Ballot Title	Ballot Summary	Full Text Of Amendment	Court Action
Workplace Smoking	"Protect People from the Health Hazards of Second Hand Tobacco Smoke by Prohibiting Workplace Smoking"	"To protect people from the health hazards of second-hand tobacco smoke, this amendment prohibits tobacco smoking in enclosed indoor workplaces."	"As a Florida health initiative to protect people from the health hazards of second-hand tobacco smoke, tobacco smoking is prohibited in enclosed indoor workplaces."	OK
Save Our Ever-Glades	"Save Our Everglades"	"Creates the Save Our Everglades Trust to restore the Everglades for future generations."	"To that end [clean up pollution and restore clean water], the people hereby establish a Trust, controlled by Florida citizens, dedicated to restoring the Everglades Ecosystem … ."	**NO**
Three Strikes	"Public Protection from Repeated Medical Malpractice"	"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."	"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."	

The summary and text of the present amendment say nothing about protecting anyone from anything. Surely that is the sponsors' political claim for the amendment, but that is for the campaign, not for the voting booth. *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 title of the amendment stands alone as a blatant political statement that does not reflect the text of the amendment, and for this reason the Court should reject it.

B. The Ballot Summary Is Misleading In Several Respects.

The ballot summary complies with the statutory limit on its length. § 101.161(1), Fla. Stat. (2003) (75-word limit). In fact, although the law allows up to 75 words for ballot summaries, this summary uses only 45 words. Brevity is generally a quality to applaud in legal writing, but brevity is ill-advised where there is much to communicate and the writing fails to communicate it. That is the case here. This ballot summary omits material information necessary to make the summary clear, accurate, and not misleading. In addition, the summary is misleading in much of what it does say, because it does not accurately reflect the text and the legal effect of the amendment itself. For any of these reasons, the Court should strike this amendment from the ballot.

1. ***Misleading Opening Statement*****.** The first and most egregious flaw in the ballot summary is its use of an opening statement that is, at best, a misleading half-truth.

The summary (like the text), states that "Current law allows medical doctors who have committed repeated malpractice to be licensed to practice medicine in Florida." This statement may be literally true in some circumstances; i.e., some physicians who commit more than one act of malpractice may obtain or retain their Florida medical licenses. The statement is not, however, a fair and accurate statement of the current law in Florida, which is what its opening phrase purports to be discussing by saying "Current law allows … ."

This statement clearly was designed to make the voter think that it fully and accurately represented the current state of the law, and this statement was "loaded" to produce a voter reaction of shock or surprise, dismay, and a desire to change that law. In other words, it makes voters think they have to vote "yes" on this amendment in order to keep "bad" physicians from practicing in Florida. This is not the law; rather, it is blatant voter manipulation through the use of misleading language, which the Court has never countenanced, and should not countenance now.

The current law of Florida already provides that physicians who commit repeated malpractice or are incompetent or otherwise present a danger to the public shall not practice in Florida: "It is the Legislative intent 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). The Legislature has established a comprehensive regulatory scheme pursuant to which the Florida Board of Medicine, an arm of the Florida Department of Health, regulates licensure and discipline of health care providers including physicians. The Legislature has developed extremely

comprehensive criteria under which the Board may refuse to license a person as a physician, or may discipline or revoke the license of a physician. § 458.331, Fla. Stat. (2003); *Id.* § 456.072(2)(b) (Board authority to suspend or revoke an existing license). Among those criteria for refusal to license, or to revoke an existing license, is "gross or repeated malpractice." § 458.331(t), Fla. Stat. (2003).[2]

The current state of Florida law is one thing, and the representation of the current state of the law that is set forth in this amendment's ballot summary is quite another thing. Given the Legislature's clear and unambiguous statements that it is the law in Florida that physicians who are incompetent, who commit repeated malpractice, or who otherwise present a danger to the public, *shall not practice in this state*, it is difficult

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[2] Section 458.331(t), Florida Statutes (2003), includes the following comprehensive circumstances under which the Board may impose discipline, which may include revocation of licensure: "Gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. The board shall give great weight to the provisions of s. 766.102 when enforcing this paragraph. As used in this paragraph, "repeated malpractice" includes, but is not limited to, three or more claims for medical malpractice within the previous 5-year period resulting in indemnities being paid in excess of $50,000 each to the claimant in a judgment or settlement and which incidents involved negligent conduct by the physician. As used in this paragraph, "gross malpractice" or "the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances," shall not be construed so as to require more than one instance, event, or act. Nothing in this paragraph shall be construed to require that a physician be incompetent to practice medicine in order to be disciplined pursuant to this paragraph. A recommended order by an administrative law judge or a final order of the board finding a violation under this paragraph shall specify whether the licensee was found to have committed "gross malpractice," "repeated malpractice," or "failure to practice medicine with that level of care, skill, and treatment which is recognized as being acceptable under similar conditions and circumstances," or any combination thereof, and any publication by the board must so specify.

to determine how the amendment before the Court is anything other than misleading when it represents to the voter that "Current law allows medical doctors who have committed repeated malpractice to be licensed to practice medicine in Florida."

The sponsor of the amendment will protest that the statement is technically true, because in some instances a physician who commits repeated malpractice might still be allowed to practice. The question, however, is not whether in some instances or under some factual circumstances a statement might be true, or whether the promoters of a constitutional amendment can craft a slick and effective "hook" sentence to scare voters and thus produce the desired results in polling. Here, we are dealing with the ballot summary of a proposed constitutional amendment, which bears higher standards of accuracy and fairness.[3] The half-truth of this statement misrepresents the current state of Florida law, beguiles the voter into believing a "yes" vote is required in order to change that (incorrectly understood) state of the law, and thus violates the law that this Court has carefully developed to protect the sanctity of the ballot.

The Court has stricken other proposed constitutional amendments for misrepresenting the current state of the law or otherwise using language that misled the voter. In *Advisory Opinion to the Attorney General re Casino Authorization, Taxation and Regulation,* 656 So. 2d 466 (Fla. 1995), the Court rejected the ballot summary

[3] Even in other legal contexts, a statement that is partially true, or is literally true but is incomplete or misleading, is a fraud and grounds for professional discipline. *See*, *e.g.*, *U.S. v. Gray*, 2004 WL 915753 at *5 (11th Cir. Apr. 30, 2004) (a half-truth can be the basis of a finding of fraud); *Florida Bd. Of Bar Examiners v. O.C.M.*, 850 So. 2d 497, 499 (Fla. 2003) (half-truths in bar application and investigation process were grounds for discipline).

because, among other flaws, "the first line of the summary is misleading in that it suggests that the amendment is necessary to prohibit casinos in this state." *Casino Authorization,* 656 So. 2d at 469. The ballot summary there started out by saying "This amendment prohibits casinos unless approved by the voters … ." However, the Court pointed out that most casinos already were prohibited by statute, and thus the amendment was misleading by suggesting otherwise. 656 So. 2d at 469. The same is true of the present amendment – the first sentence of its summary is misleading by suggesting that the current law of Florida is something other than what it actually is. Just as the Court rejected this tactic in *Casino Authorization*, it should reject the tactic here.

The Court in *Casino Authorization* likened that amendment's misleading ballot summary to the summary the Court had rejected in *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982). *Casino Authorization*, 656 So. 2d at 469. In *Askew,* the ballot summary of a legislatively-proposed amendment announced that it "[p]rohibits former legislators and statewide elected officers" from lobbying for two years after they left office unless they fulfilled certain disclosure criteria. *Askew*, 421 So. 2d at 153. In fact, whereas the proposed amendment would have the effect of permitting lobbying after the simple expedient of filing a disclosure, an already-existing constitutional provision absolutely precluded lobbying a former body or agency for two years. Thus the Court concluded that the "ballot summary neglects to advise the public that there is presently a complete two-year ban on lobbying before one's agency." 421 So. 2d at 155.

The effect of the amendment in *Askew* was actually to expand lobbying rights, but its summary gave the opposite impression. The Court noted that "[t]he problem,

therefore, lies not with what the summary says, but, rather, with what it does not say," and that "[a] proposed amendment cannot fly under false colors; this one does." *Id.* at 155-56. So too here, the amendment now before the Court misrepresents the current state of Florida law and thus flies under false colors. It is misleading to the voter and the Court should reject it.

2. ***The Summary Is Ambiguous*.** The ballot summary is ambiguous because (a) it uses operative terms that are specially defined in the text of the amendment, but it does not tell the voter that they are specially defined, and mean something other than their ordinary meanings: "medical malpractice" and "found to have committed." Given that the summary was allowed to use 75 words, but only used 45 words, it would have been a simple matter to alert the voter to the fact that specially defined terms are used in the text: "Provides definitions" would have done it.[4] Yet the summary fails to so advise the voter. The summary also is ambiguous because (b) it uses other key terms, "medical doctor" and "three or more incidents," that are not defined at all in either the summary or the amendment and are susceptible to varying interpretations. These omissions render the summary fatally misleading to the voter. The Court has held repeatedly that a ballot summary, although not required to exhaust all details about the ramifications of the amendment, ***must not*** use ambiguous and undefined terms:

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[4] In previous amendments where the texts utilized specially defined terms, the Court approved summaries that simply advised the voter to look to the text for the definitions. *E.g.*, *Workplace Smoking*, 814 So. 2d at 416 ("Provides definitions, and requires the legislature to promptly implement this amendment."); *Advisory Op. to the Att'y Gen. – Limited Marine Net Fishing*, 620 So. 2d 997, 999 (Fla. 1993) ("Provides definitions, administrative and criminal penalties, and exceptions for scientific and governmental purposes").

> '[T]he word limit does not give drafters of proposed amendments leave to ignore the importance of the ballot summary and to provide an abbreviated, ambiguous statement in the hope that this Court's reluctance to remove issues from the ballot will prevent us from insisting on clarity and meaningful information.'
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> [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) (quoting from *Smith v. American Airlines, Inc.*, 606 So. 2d 618, 621 (Fla. 1992)). The ballot summary before the Court uses ambiguous terms that it neither defines, nor advises the voter are defined in the text of the amendment; and it fails to adequately describe key components of the operation of the amendment. It is misleading, and it is invalid.

(a) Failure to Disclose that Defined Terms Are Used, And That Their Meanings Are Not As Is Commonly Understood. The summary uses the terms "medical malpractice" and "found to have committed," which are specially defined in the text of the amendment. As defined in the amendment, these terms do not mean what the average voter probably would think they mean. The average person has a general understanding that "medical malpractice" is an act that results in tort liability, such an understanding being based on very common news or anecdotal reports of claims of medical negligence and the lawsuits they spawn. Likewise, the average voter

probably thinks “found to have committed” refers to a finding by a court, in a tort claim for damages, that malpractice was committed. These would be reasonable interpretations of these key operative phrases of the amendment.

The text of the amendment, though, creates new definitions of both phrases, incorporating specifics that the average voter probably would not understand to be within the scope of the terms. In defining “medical malpractice,” the text references only *part of* the standard of care that would apply in a tort claim,[5] and then purports to incorporate “general law related to health care providers’ licensure”:

> '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*** … .

(Emphasis added.) A licensure proceeding, of course, is different from a tort claim. The elements of the cause of action are different, and the burden of proof is different (clear and convincing for licensure versus a preponderance of the evidence in a tort claim).[6] It is not clear what the text means to accomplish by merging tort liability with licensure standards in the definition of “medical malpractice,” nor how that would play out in practice, but whatever it means, it is not disclosed in the summary, and the

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[5] The tort claimant must prove that the defendant breached "the prevailing professional standard of care for that health care provider," and for any given provider the standard of care is "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).

[6] *See, e.g., Nair v. Department of Bus. & Prof. Reg.*, 654 So. 2d 205, 206-07 (Fla. 1st DCA 1995) (standard of proof necessary to suspend or revoke a license is clear and convincing evidence); *Beal Bank, SSB v. Almand and Assoc.*, 780 So. 2d 45, 59 n.19 (Fla. 2001) ("'Preponderance of the evidence' is the generally accepted burden of proof in civil matters."). These common law standards are codified for medical malpractice cases at section 458.311(3), Florida Statutes (2003).

summary does not even warn the voter that there are special definitions in the text that should be consulted. This renders the summary fatally ambiguous and misleading.

(b) Use of Undefined Terms. The summary also is ambiguous for using the undefined phrases "medical doctor" and "three or more incidents." While it is true that the summary accurately mirrors the amendment's use of the same undefined phrases, the test of validity is not merely whether the summary parrots the same words as the text. In *Advisory Opinion to the Attorney General re: People's Property Rights Amendments*, 699 So. 2d 1304, 1308-09 (Fla. 1997), this Court held that certain language in the ballot summary was ambiguous and misleading to the voters even though the summary tracked the identical wording of the amendment. The question is whether the summary communicates accurately and fully to the voter what is being voted upon. This summary does not.

The phrase "medical doctor" is not defined in the amendment, nor in the Florida Statutes governing the health care professions. The statutes define a person licensed to practice medicine in Florida as a "physician." §§ 458.305, .311, Fla. Stat. (2003). This may or may not be the group of health care providers that the amendment intends to govern; and it may or may not be the group that the voter might *think* it covers. The voter may understand "medical doctors" to refer to those who satisfactorily complete a certain program of study in medical school and thus earn the degree of doctor of medicine, and may put the letters "M.D." after their names. However, not everyone with such an educational degree is a "physician" authorized to practice medicine in Florida, and so if the amendment is intended to cover only "physicians," its use of the

phrase “medical doctor” is misleading. Someone with an M.D. after their name may or may not be covered by this amendment, and the voter cannot be assured of guessing correctly when evaluating the amendment in the voting booth.

Voters evaluating the ballot summary may well think in terms of malpractice lawsuits and assume that "medical doctor" covers the wide variety of "health care providers" subject to Florida’s tort claim laws for medical malpractice litigation. Such an interpretation would find support in the text of the amendment, which defines “medical malpractice” by referencing “health care providers” -- a statutorily-defined and broad category of persons. *See* § 766.202(4), Fla. Stat. (2003).[7] Some of these are "physicians," and many are not, and they may or may not have the M.D. degree. This ambiguity goes to the heart of the amendment.

Likewise, the undefined phrase “three or more incidents” is susceptible to so many different interpretations that it is almost impossible to determine what it is supposed to mean in this context. In past cases, when the Court has encountered undefined phrases, it has looked to the ordinary dictionary definition to determine whether its usage in a ballot summary is ambiguous. *E.g., Workplace Smoking,* 814

[7] Section 766.202(4) provides as follows: "'Health care provider' means any hospital, ambulatory surgical center, or mobile surgical facility as defined and licensed under chapter 395; a birth center licensed under chapter 383; any person licensed under chapter 458 [physicians], chapter 459 [osteopaths], chapter 460 [chiropractors], chapter 461 [podiatrists], chapter 462 [naturopaths], chapter 463 [optometrists], part I of chapter 464 [nurses], chapter 466 [dentists and dental hygienists], chapter 467 [midwives], or chapter 486 [physical therapists]; a clinical lab licensed under chapter 483; a health maintenance organization certificated under part I of chapter 641; a blood bank; a plasma center; an industrial clinic; a renal dialysis facility; or a professional association partnership, corporation, joint venture, or other association for professional activity by health care providers."

So. 2d at 420-21 & n.5). The dictionary defines "incident" as "an occurrence of an action or situation that is a separate unit of experience," which is not helpful in clearing up the ambiguity in this context. Webster's New Collegiate Dictionary (2000). It could mean three or more "lawsuits," each lawsuit counting as a single "incident" regardless of how many individual acts of negligence might have been encompassed within the lawsuit. It could mean acts involving three or more "patients," with each patient's case constituting an "incident" regardless of how many separate acts of negligence might have been committed in that patient's care. It could mean three or more separate acts of negligence – and if that is the case, then it is possible that one "case" in court could involve the requisite "three or more incidents." If so, one could not be sure whether the amendment would deliver the promised revocation of licensure after the one "case" in court concluded; or if it would take three "cases" in court to reach the trigger number, in which event more than three acts of negligence might have been committed, and the promise of action after three "incidents" would be proven an empty promise.

"Three or more incidents" is ambiguous for the additional reason that it is impossible to determine whether a single act of negligence could produce two "incidents" within the meaning of the amendment, if a claimant establishes a basis for tort liability arising out of the act of negligence, and the Board of Medicine also disciplines the physician for the same act of negligence. The lack of definition of "three or more incidents" has serious repercussions for the operation of the amendment as a whole; but for purposes of the summary, this omission is fatal

because the voter cannot possibly guess what is meant by the undefined phrase, and thus cannot possibly make an informed decision in the voting booth.

3. ***The Summary Omits Material Information.*** The summary is fatally flawed for the additional reason that it fails to track the key operative provisions of the amendment accurately, omitting important aspects of the amendment that the voter needs to know in order to make an informed decision. The Court has always held that the summary need not include every detail or ramification of the amendment, because the 75-word limit simply does not allow that; and it is possible for a well-drafted summary to be accurate and not misleading without including every detail of the amendment. *E.g.*, *Carroll v. Firestone*, 497 So. 2d 1204, 1206 (Fla. 1986). Nevertheless, the Court has stricken ballot summaries that omitted material information necessary to make the summary accurate and not misleading, and that is the case here.

In *Askew*, the Court struck down the amendment, not because of what the ballot summary said, but rather because of what the ballot summary did not say. The ballot summary in this initiative suffers from the same flaw. It does not explain that the amendment will mean that physicians will be under tremendous pressure to settle virtually every claim of malpractice asserted against them. The result may be the very opposite of what the sponsors promote as their political motivation: physicians with repeated problems may continue to be licensed. Even physicians with a strong defense against pending claims will be at the mercy of their patients and be forced to settle because they cannot take the chance of being deprived of their livelihood.

The summary does not disclose that legislative implementation will be necessary to flesh out the details of the proposed new law, such as what constitutes an "incident" of malpractice and how to determine whether an act committed outside of Florida would have constituted malpractice in Florida. The Court has held that it is misleading to fail to advise the voter that the legislature will be required to flesh out the details of implementing an amendment. *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). Although in *Right to Treatment* the amendment expressly called for legislative implementation and disclosed that requirement in the summary, it is no defense here for the sponsors to assert that their amendment does not expressly require legislative implementation. It requires implementation as a practical matter, and the two wrongs of failing to say so in both the amendment and in the summary do not make it right.

The summary also does not explain that none of the incidents of malpractice that would preclude licensure in Florida would have to have occurred in Florida; i.e., the amendment says the acts could have taken place anywhere in the world, but that is never mentioned in the summary. The summary discloses that committing three incidents of malpractice can prevent a physician from being licensed, but it does not disclose that a physician once licensed also can lose that license under this amendment. Finally, the summary fails to explain whether the amendment would have retroactive application such that any incidents of malpractice that may have occurred

prior to passage of the amendment would count against the physician. With so much that is important left out of the summary, one wonders why the drafters stopped at 45 words. These omissions collectively prevent the voter from making an informed decision in the voting booth.

II. THE AMENDMENT VIOLATES THE SINGLE-SUBJECT RULE.

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

The amendment violates the single-subject requirement because it substantially affects multiple functions of government. An initiative that affects multiple branches of government will not automatically fail, of course. *See Advisory Op. to Att'y Gen. re Limited Casinos,* 644 So. 2d 71, 74 (Fla. 1994) ("It is difficult to conceive of a constitutional amendment which would not affect other aspects of government to some extent."). If, however, an amendment substantially alters or performs the functions of multiple branches of government, it is invalid. *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 Functions. As already noted, the Florida Legislature has crafted the public policy of this state with respect to the licensure of physicians who are incompetent, who commit repeated malpractice, or who otherwise present a danger

to the public, stating that they shall not practice in Florida. § 458.301, Fla. Stat. (2003). The Florida Legislature has crafted the public policy of this state with respect to licensure of physicians entering this state from other states or countries. § 456.021-.022, Fla. Stat. (2003). The Florida Legislature has enacted a complex regulatory scheme to implement this public policy, as reflected in chapter 456, Florida Statutes, governing the professions in general; and chapter 458, the practice act governing physicians; and many other practice acts governing health care providers. The Florida Legislature has conferred on the Department of Health and its Board of Medicine the authority and responsibility for determining who will obtain and who will keep a license to practice medicine in Florida. § 458.307, Fla. Stat. (2003) (creating BOM); § 456.072(2)(b), Fla. Stat. (2003) (conferring power to suspend or revoke licenses). This amendment changes all of that.

A citizen-initiated constitutional amendment is, of course, allowed to have the effect of amending statutory law; in fact, in most instances a new constitutional amendment will necessitate changes in the statutes. *See Advisory Op. to the Att'y Gen. re: Prohibiting Public Funding of Political Candidates' Campaigns*, 693 So. 2d 972, 975-76 (Fla. 1997) (ballot language is not misleading merely because amendment will invalidate existing statutory law); *Advisory Op. to the Att'y Gen., Limitation of Non-Economic Damages in Civil Actions*, 520 So. 2d 284, 287 (Fla. 1988) (inconsistent statutes and jury instructions "will simply have to give way"). However, this amendment does more than amend a statute or two, or require passage of

legislation to comply with the amendment. It substantially alters the entire legislative scheme for the licensure of the medical profession.

Of course, a proposed amendment can usurp the single legislative branch function of establishing state policy on a given subject, as this one does. But, where an amendment does that, and *also* substantially alters or affects either an executive branch function or a judicial branch function, or both, it violates the single-subject rule for ballot initiatives. This amendment does just that.

Executive Branch Functions. In addition to its legislative function, this amendment substantially affects the executive branch function of the Department of Health and the Board of Medicine (and, depending on the scope of "medical doctor," perhaps several other regulatory Boards). It takes away completely the authority and discretion vested in those bodies to determine licensure questions as to health care providers within the scope of the amendment (which scope is far from clear). This amendment divests the Board of the authority to examine the nature and circumstances of each incident of medical malpractice and to determine the proper sanction to be imposed. 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 factors that the Board would otherwise consider such as how close together the incidents occurred (e.g., within the past five years or within a physician's entire 50-year career), the severity of the act and of the consequences to the patient, and whether the physician was at the time engaged in a routine practice function as opposed to a high-risk specialty that few other providers

could offer. For this amendment to usurp this executive function in addition to performing the legislative policy and law-making functions violates the single-subject rule.

Judicial Branch Functions. Further, this proposal usurps core judicial branch functions. Consider how its definitions of "found to have committed" and "medical malpractice" interact. It says that a final judgment of a court of law will count as a finding of having committed malpractice. Presumably, then, the amendment contemplates that a tort claim for malpractice will produce a finding that would count towards the three-"incident" total under this amendment. Ordinarily, in a tort claim for medical negligence, the claimant must show by a preponderance of the evidence that the particular health care provider deviated from the governing standard of care. It is a question of fact in these cases to establish the standard of care and that it was breached.

This amendment, however, defines "medical malpractice" in a new way, not just involving the breach of the governing standard of care, but incorporating "general law related to health care providers' licensure": "'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 … ." It then defines "found to have committed" in terms of "the malpractice," presumably meaning malpractice as defined in this amendment. But a tort claimant is setting out to prove that the defendant committed negligence and should pay for it financially, the standard of care being "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). A tort claimant is not setting out to prove that the defendant should not be licensed; i.e., is not setting out to satisfy the special definition of "medical malpractice" that this amendment creates. Thus, a tort claim and the resulting final judgment of a court of law could never produce the "finding" that the defendant committed "malpractice" *as defined in this amendment*.

The only way the amendment could be telling the truth when it says a final court judgment can count toward the "found to have committed" total is if the tort claimant established the elements of the cause of action for malpractice *as defined in this amendment,* and under the clear and convincing burden of proof required in licensure cases. If that is what the amendment contemplates, then it is usurping core judicial branch functions by dictating new elements of proof and a new burden of proof in malpractice cases. The only other way to produce a final court judgment of malpractice that meets the standards of these definitions would be to re-try every physician accused of negligence in a separate action applying these defined standards, and nothing in the amendment hints that this is what is contemplated (and the expense and impracticality of doing that is mind-boggling).

The amendment also performs a judicial branch function by unilaterally imposing the Florida standard of care on all acts of negligence that occurred in another state or in another country. In tort actions for medical negligence, each defendant practitioner is entitled to be judged on the basis of the standard of care that is followed by

practitioners performing similar procedures in a similar community, the so-called "locality rule," which must be established at trial. *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, however, effectively eliminates the locality rule as to any act that occurred outside of Florida, replacing it with the new statewide Florida malpractice standard that this amendment creates. The drafters of this amendment thus play judge and jury, which they may not do – at least, not in the same constitutional amendment in which they are already substantially performing the functions of both other branches of government. *See Save Our Everglades*, 636 So. 2d at 1340 ("It is as though the drafters drew up their plan to restore the Everglades, then stepped outside their role as planners, donned judicial robes, and made factual findings and determinations of liability and damages.").

The single-subject rule limits what can be accomplished in a citizen-initiated constitutional amendment. Some goals simply cannot be achieved through this process. Because this amendment substantially alters or performs the functions of more than one branch of government, it violates the single-subject rule, and 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 24th day of May, 2004.

HOLLAND & KNIGHT LLP

Stephen H. Grimes (FBN 0032005)
Susan L. Kelsey (FBN 772097)
P.O. Drawer 810
Tallahassee, FL 32302
Ph. (850) 224-7000
Fax (850) 224-8832

Counsel for the FMA
Opposing the Amendment

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail, this 24th day of May, 2004, to the following:

_____
Attorney

The Honorable Jeb Bush
Governor, State of Florida
The Capitol
400 S. Monroe Street
Tallahassee, Florida 32399-0001

The Honorable Glenda E. Hood
Secretary of State
Florida Department of State
R. A. Gray Building
500 S. Bronough St.
Tallahassee, FL 32399-0250

The Honorable Charlie Crist
Attorney General of Florida
The Capitol, PL-01
Tallahassee, FL 32399

The Honorable James E. King, Jr.
President of the Senate
Suite 409, The Capitol
404 South Monroe Street
Tallahassee, FL 32399-1100

The Honorable Johnnie Byrd
Speaker of the House
Suite 420, The Capitol
402 South Monroe Street
Tallahassee, FL 32399-1300

Harold R. Mardenborough, Jr.
McFarlain & Cassedy, P.A.
305 S. Gadsden St.
Tallahassee, FL 32301
Counsel for Opponent,
Florida Dental Ass'n

Graham H. Nichol
Don A. Dennis
Florida Dental Association
1111 E. Tennessee St.
Tallahassee, FL 32308

Mr. Scott Carruthers, Chair
Floridians for Patient Protection
218 S. Monroe St.
Tallahassee, FL 32301

Jon Mills
Timothy McLendon
P.O. Box 2099
Gainesville, FL 32602
Local Counsel for the Sponsor

Barnaby W. Zall
Weinberg & Jacobs, LLP
11300 Rockville Pike, Suite 1200
Rockville, MD 20852
Counsel for the Sponsor
(pro hac vice motion pending)

CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14 point type, a font that is proportionately spaced.

_____
Attorney

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