

7-1-2006

# A New Prescription: How a Thorough Diagnosis of the "Medical Malpractice" Amendments Reveals Potential Cures for Florida's Ailing Citizen Initiative Process

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## Recommended Citation

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**A NEW PRESCRIPTION: HOW A THOROUGH DIAGNOSIS  
OF THE “MEDICAL MALPRACTICE” AMENDMENTS  
REVEALS POTENTIAL CURES FOR FLORIDA’S AILING  
CITIZEN INITIATIVE PROCESS**

ERIC S. MATTHEW\*

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\* J.D., *cum laude*, University of Miami School of Law, 2006; B.A., History, University of California, Los Angeles, 2003. The author would like to thank the following people: my parents, Dr. Jon and Hilary Matthew for their unconditional love, guidance and support; my friends for making law school a little more tolerable and a lot more memorable; and the UNIVERSITY OF MIAMI BUSINESS LAW REVIEW Executive and Editorial Board for all their hard work. This Article is dedicated to the memory of Will Britt. Will, you would have made a worthy adversary on the other side of the courtroom. Of course, any and all mistakes in this article are solely those of the author.

## I. INTRODUCTION

In Florida, the ability to make new law does not rest solely in the hands of elected officials. Contrary to the traditional form of representative government, the Florida Constitution authorizes citizens and special interest groups to enact constitutional amendments using the citizen initiative process.<sup>1</sup> This procedure places direct power in the hands of the voting public and embraces the ideals of a direct democracy. However, amending the state constitution by citizen initiative essentially allows initiative sponsors to bypass all three branches of government when making laws and dangerously circumvents bureaucratic checks and balances.<sup>2</sup> Indeed, there are many problems with Florida's present system.

In 1994, Florida citizens voted to amend the state constitution to protect saltwater finfish, shellfish, and other marine animals.<sup>3</sup> As a result, there is presently a provision in the Florida Constitution prohibiting the use of mesh fishing nets larger than 500 square feet.<sup>4</sup> In the 2002 election, Florida citizens voted to amend the state constitution to help prevent the cruel treatment of animals, specifically pregnant pigs.<sup>5</sup> The Florida Constitution now requires pregnant pigs to be kept in cages large enough to allow the pig to turn around freely.<sup>6</sup> Notwithstanding the purported merit of these laws, is there a problem posed in that these issues are addressed via constitutional amendments and not by legislatively enacted statutes?

In 2002, the majority of Florida voters supported a smoking ban amendment<sup>7</sup> sponsored by an anti-smoking group.<sup>8</sup> Not to be outdone, cigarette companies and restaurants tried to propose a competing amendment the very same election.<sup>9</sup> The only reason the pro-smoking amendment did

<sup>1</sup> FLA. CONST. art. XI, § 3. *See infra* Part III. This procedure is also known as the "ballot initiative" process.

<sup>2</sup> *See id.*

<sup>3</sup> FLA. CONST. art. X, § 16. ("[T]he people hereby enact limitations on marine net fishing in Florida waters to protect saltwater finfish, shellfish, and other marine animals from unnecessary killing, overfishing and waste.")

<sup>4</sup> *See id.*

<sup>5</sup> FLA. CONST. art. X, § 21. ("Inhumane treatment of animals is a concern of Florida citizens. To prevent cruelty to certain animals ... the people of the State of Florida hereby limit the cruel and inhumane confinement of pigs during pregnancy as provided herein.")

<sup>6</sup> *See id.*

<sup>7</sup> FLA. CONST. art. X, § 20.

<sup>8</sup> Smoke-Free for Health, Inc., the anti-smoking committee sponsoring this initiative, was able to gain over 70% of the votes during the 2002 election. Details about this committee are available at <http://election.dos.state.fl.us/initiatives/initdetail.asp?account=34548&seqnum=1> (last visited Mar. 20, 2006).

<sup>9</sup> The Committee for Responsible Solutions, backed by Philip Morris, proposed a deceptively

not appear on the ballot is that its sponsors failed to obtain the requisite number of signatures prior to the election.<sup>10</sup> Is it a problem that procedural constraints almost failed to prevent the public from voting on and potentially passing two conflicting constitutional amendments, addressing identical issues, during the same election?

Florida voters passed a constitutional amendment in 2000 that required the state to construct a high-speed monorail or train linking the five largest cities in Florida.<sup>11</sup> For a brief period the Florida Constitution mandated a state-sponsored, state-wide train system—the transportation amendment was revoked in the last election.<sup>12</sup> Is it a problem that the Florida Constitution changes constantly and no longer provides a stable source of law?<sup>13</sup>

Three citizen initiatives that address health care tort reform illustrate the problems of allowing citizens to amend the constitution via initiative. Colloquially known as the “medical malpractice” amendments, they were added to the Florida Constitution in the 2004 election. The first amendment limits attorney contingency fees in medical malpractice cases.<sup>14</sup> The second amendment creates a constitutional right for persons to have access to all medical records concerning prior acts of physicians and nurses that may have caused bodily injury or death to a former patient.<sup>15</sup> The final amendment, referred to as the “three strikes” amendment, revokes the medical license of any physician that is found to have committed three or more acts of malpractice.<sup>16</sup> Using these amendments as a model to identify the

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similar amendment aiming at restricting, rather than prohibiting, indoor smoking. Details about this committee are available at <http://election.dos.state.fl.us/initiatives/initdetail.asp?account=34830&seqnum=1> (last visited Mar. 20, 2006).

<sup>10</sup> *Id.*

<sup>11</sup> FLA. CONST. art. X, § 19. Prior to its repeal, this amendment read in pertinent part:

High speed ground transportation system. —To reduce traffic congestion and provide alternatives to the traveling public, it is hereby declared to be in the public interest that a high speed ground transportation system consisting of a monorail, fixed guideway or magnetic levitation system, capable of speeds in excess of 120 miles per hour, be developed and operated in the State of Florida to provide high speed ground transportation by innovative, efficient and effective technologies consisting of dedicated rails or guideways separated from motor vehicular traffic that will link the five largest urban areas of the State.

<sup>12</sup> FLA. CONST. art. X, § 19.

<sup>13</sup> See Advisory Op. to Att’y Gen. *In re Limited Marine Net Fishing*, 620 So. 2d 997, 1000 (1993) (McDonald, J., concurring) (“The legal principles in the state constitution inherently command a higher status than any other legal rules in our society. By transcending time and changing political mores, the constitution is a document that provides stability in the law and society’s consensus on general fundamental values.”).

<sup>14</sup> FLA. CONST. art. I, § 26.

<sup>15</sup> FLA. CONST. art. X, § 25.

<sup>16</sup> FLA. CONST. art. X, § 26.

insufficiencies of the initiative process, this Article argues that Florida should implement specific procedural changes and encourage public debate on initiatives to preserve the sanctity of the Florida Constitution without overly impinging on the people's right of self-governance.

Part II of this Article provides an overview of the citizen initiative in Florida, and summarizes the medical malpractice amendments. Part III critiques the procedural requirements of placing a citizen initiative on the Florida ballot, and scrutinizes the forms of judicial review. Part IV identifies what can happen when citizens myopically enact constitutional amendments and fail to anticipate their long term effects. Part V dismisses several potential procedural changes and suggests alternative ameliorative measures to salve the ailing wounds of the citizen initiative process. Certainly the public's right to make law is a paradigm of civil liberty. However, the uncertain effect of the medical malpractice amendments upon Florida citizens proves that this freedom cannot go unrestrained.

## II. SELF MEDICATION: CITIZEN INITIATIVES IN FLORIDA

The initiative petition is one of five ways to amend the Florida Constitution.<sup>17</sup> However, Florida has not always extended the right to propose amendments by initiative petition.<sup>18</sup> In fact, the majority of states still do not have a citizen initiative process.<sup>19</sup> Moreover, in most states that have initiative procedures, citizens can amend the state constitution, state

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<sup>17</sup> In Article XI the Florida Constitution provides for amendment by (1) a joint resolution agreed to by three-fifths of the membership of each house of the Florida Legislature. FLA. CONST. art. XI, § 1; (2) recommendation by the Constitutional Revision Commission that meets every twentieth year to examine the constitution and make amendments as deemed necessary. FLA. CONST. art. XI, § 2; (3) a constitutional convention FLA. CONST. art. XI, § 4; (4) a recommendation from the Taxation and Budget Reform Commission, which meets every tenth year since 1980. FLA. CONST. art. XI, § 6; and (5) the ballot initiative process. FLA. CONST. art. XI, § 3.

<sup>18</sup> For a detailed overview of the history of the Florida Constitution, see TALBOT D'ALEMBERTE, *THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE + EDITING INFORMATION* (G. Alan Tarr ed., Greenwood Press) (1991). In short, the document established by constitutional convention in 1838 and ratified by citizens the following year was the basic charter when Florida entered the Union in 1845. *Id.* at 4. Notwithstanding changes to the Florida Constitution from statehood to post-reconstruction, in 1968, material alterations to the powers afforded to various branches of government essentially created Florida's "modern" constitution. *Id.* at 12. That year, revisions added two new methods for amending the constitution: a constitution revision commission and the initiative procedure. *Id.* at 13. Now, the Florida Constitution has more methods of amendment than any other state constitution. *Id.* at 15.

<sup>19</sup> See P. K. Jameson & Marsha Hosack, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues and Alternatives*, 23 FLA. ST. U. L. REV. 417, 432 (1995) (citing Tommy Neal, *The Voter Initiative*, 1 NAT'L CONF. STATE LEGISLATURES LEGISBRIEF 38, Oct. 1993, at 1).

statutes, or both.<sup>20</sup> Florida is the *only* state that affords citizens the opportunity to amend the constitution via direct initiative but does not allow citizens the alternative route of the statutory initiative.<sup>21</sup> Equally important to note, Florida has a *direct* constitutional initiative process. Conversely, the indirect process requires proposals be submitted to the Legislature before being placed on the ballot.<sup>22</sup> True, initiatives ultimately require approval of the state's electorate, but the procedure in Florida lacks an effective filtering mechanism inherent in a representative democracy.<sup>23</sup> Consequently, as each passing election finds more and more citizens trying to shape and mold the Florida Constitution, an increasing number actually succeed in doing so. New laws are supposed to remedy bureaucratic deficiencies, but changing the constitution does not always effectuate improvement.

### A. Background: The Patient History

From 1968 to 1984,<sup>24</sup> not one citizen initiative ever made it to the ballot. From 1987 to 1996, ten initiatives made the ballot and seven were approved by Florida voters.<sup>25</sup> However, in the last two elections alone, 12 initiatives made the ballot and all 12 passed.<sup>26</sup> Though only one citizen initiative will appear on the 2006 ballot,<sup>27</sup> there were 49 active ballot initiatives with

<sup>20</sup> See *id.*

<sup>21</sup> See "State by State Comparison," [http://www.votesmartflorida.org/votesmarthw/hw.dll?page&file=state\\_by\\_state](http://www.votesmartflorida.org/votesmarthw/hw.dll?page&file=state_by_state) (last visited Mar. 20, 2006).

<sup>22</sup> See, e.g., MISS. CONST. art. 15, § 273. Discussed *infra* Part V.

<sup>23</sup> See Robert M. Norway, *Judicial Review of Initiative Petitions in Florida*, 5 FL. COASTAL L. J. 15 (2004). Norway cites to the 1997-1998 Constitutional Revision Commission where Governor Lawton Chiles lamented "[W]e never imagined the proliferation of people paying to put initiatives on the ballot. I think this practice flies in the face of what a representative democracy is supposed to be. I believe our country was founded as a representative democracy—not a participatory democracy. There is a clear difference. In a representative democracy, we elect officials to act on behalf of our people. It's an important concept for us to understand." *Id.*

<sup>24</sup> 1968 was the first year the Florida Constitution permitted amendment by citizen initiative, but an amendment was passed in 1972 requiring the language of the ballot initiatives to address "but one subject and matter directly connected therewith." See FLA. CONST. art. XI, § 3. See also "A Look at the Trend of Ballot Initiatives," <http://www.votesmartflorida.org/votesmarthw/hw.dll?page&file=trendbi> (last visited Mar. 20, 2006).

<sup>25</sup> See "A Look at the Trend of Ballot Initiatives," *supra* note 24.

<sup>26</sup> *Id.*

<sup>27</sup> Amendment 4, which will appear on the 2006 ballot, is officially titled "Protect People, especially youth, from addiction, disease, and other health hazards of using tobacco." The amendment essentially seeks to utilize a greater percentage of Florida's tobacco settlement monies to create a comprehensive, statewide tobacco education and prevention program. More information on Amendment 4 is available at [http://www.votesmartflorida.org/votesmartdocs/VSF\\_VoterGuide\\_2006\\_Amendment4.pdf](http://www.votesmartflorida.org/votesmartdocs/VSF_VoterGuide_2006_Amendment4.pdf) (last visited Mar. 23, 2006).

sponsors trying to gather the requisite signatures<sup>28</sup> as of the February 1, 2006 deadline.<sup>29</sup> Special interest sponsors are increasing their efforts and expenditures towards passing initiatives—this was especially evident in the 2004 election.

### B. *The “Medical Malpractice” Amendments*

On November 2, 2004, the public approved three ballot initiatives that were ostensibly beneficial to the citizens of Florida. In reality, the passage of Amendments 3, 7, and 8 resulted in discord, and repercussions of their far-reaching influence are still not fully apparent. Prior to discussing the backlash of the last election, however, it is imperative to examine each amendment in greater detail.

## 1. MEDICAL LIABILITY CLAIMANT’S COMPENSATION AMENDMENT

Positioned on the ballot as Amendment 3,<sup>30</sup> this initiative delineates attorney caps on non-economic damages in medical malpractice negligence actions.<sup>31</sup> In essence, the amendment affords a greater percentage of the

<sup>28</sup> See FLA. DEP’T OF STATE, DIV. OF ELECTIONS, INITIATIVES / AMENDMENTS / REVISIONS, <http://election.dos.state.fl.us/initiatives/initiativelist.asp> (last visited Mar. 20, 2006) (Select “2006” as the year and “Active” as status, then run query.).

<sup>29</sup> The February 1st deadline for verifying signatures was implemented in the 2004 election with the passage of a legislatively proposed constitutional amendment. As amended, the Florida Constitution now provides:

(b) A proposed amendment or revision of this constitution, or any part of it, by initiative shall be submitted to the electors at the general election provided the initiative petition is filed with the custodian of state records no later than February 1 of the year in which the general election is held.

FLA. CONST. art. X, § 5.

<sup>30</sup> FLA. ADMIN. CODE ANN. r. 1S-2.011 (2005). This administrative code provision outlining constitutional amendment ballot positions reads in pertinent part:

(1) The Director of the Division of Elections shall assign in the following manner a designating number to any proposed revision or amendment to the State Constitution for placement on the general election ballot:

(a) The ballot position of each proposed revision or amendment shall correspond to the designating number assigned by the director. A designating number may not be assigned to a constitutional amendment by initiative until the Secretary of State has issued a certificate of ballot position in accordance with s. 100.371, F.S.

*Id.*

<sup>31</sup> The full text of the amendment reads:

Section 1. Article I, Section 26 is created to read ‘Claimant’s right to fair compensation.’ In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first \$250,000.00 in all damages received by the claimant, exclusive of

damage award to the claimant.<sup>32</sup> Florida already provides a statutory limitation on the recovery of non-economic damages,<sup>33</sup> which are non-financial losses, like pain and suffering.<sup>34</sup> Limiting the percentage of recovery and capping the total recovery created a financial quandary for plaintiffs and their attorneys, although the voting public was markedly unaware of such a problem.<sup>35</sup>

Trial lawyers spent nearly \$25 million trying to defeat the measure, suggesting this amendment would make Florida's health care system less safe and effective by limiting access to the courts and costing taxpayer money to help care for medical malpractice victims.<sup>36</sup> Needing only a simple majority, Amendment 3 nevertheless passed easily with the support of the Florida Medical Association.<sup>37</sup>

## 2. PATIENT'S RIGHT TO KNOW ABOUT ADVERSE MEDICAL INCIDENTS

Primarily supported by the Academy of Florida Trial Lawyers, Amendment 7 allows medical patients to access information about their doctor's

reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of \$250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation. This Amendment shall take effect on the day following approval by the voters.

FLA. CONST. art. I, § 26.

<sup>32</sup> See *id.*

<sup>33</sup> See FLA. STAT. § 766.202(8) (2005) (defines non-economic damages as "nonfinancial losses that would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses to the extent the claimant is entitled to recover such damages under general law, including the Wrongful Death Act.").

<sup>34</sup> See FLA. STAT. § 766.118(2) (2005). Generally, non-economic damages cannot exceed \$500,000 per claimant. However, if negligence results in permanent vegetative state or death, recovery is extended to \$1,000,000. In medical malpractice actions, those amounts are \$750,000 and \$1,500,000, respectively. See FLA. STAT. § 766.118(3) (2005). Occurrences of negligence involving emergency medical treatment have a damage cap of \$300,000. See FLA. STAT. § 766.118(4) (2005).

<sup>35</sup> Discussed *infra* Part IV.

<sup>36</sup> See Insurance Journal, "Florida Doctors, Lawyers at Odds Over Effect of Malpractice Amendments," November 5, 2004, <http://www.insurancejournal.com/news/southeast/2004/11/05/47480.htm> (last visited Mar. 20, 2006).

<sup>37</sup> Officially sponsored by Citizens for a Fair Share, Inc., the top three contributors to this initiative effort were the Florida Medical Association, Citizens for Tort Reform, and the American Medical Association. In total, proponents of this measure spent approximately \$9.1 million. See FLA. DEP'T OF STATE, DIV. OF ELECTIONS, CITIZENS FOR A FAIR SHARE, INC., <http://election.dos.state.fl.us/cgi-bin/comhtml.exe?account=37767> (last visited Apr. 12, 2006).



previous incidents of malpractice.<sup>38</sup> Since the initiative passed, there has been widespread confusion about its scope and application.<sup>39</sup> In 2005, the Florida Legislature passed the “Patients’ Right-to-Know About Adverse Medical Incidents Act” for the purpose of implementing the Amendment 7.<sup>40</sup> This statute merely clarifies the terminology in Amendment 7, which still gives patients the right to review, upon request, records of health care facilities’ or providers’ adverse medical incidents.<sup>41</sup>

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<sup>38</sup> FLA. CONST. art. X, § 25. This amendment reads:

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

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

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

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

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

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

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

*Id.*

<sup>39</sup> See *infra* Part IV.A.3. See, e.g., FLA. SOC’Y OF OPHTHALMOLOGY, JUDGE RULES AMENDMENT SEVEN IS SELF IMPLEMENTING AND DOES NOT NEED LEGISLATIVE REVIEW, <http://www.mdeye.org/news/2426.php> (last visited Apr. 12, 2006).

<sup>40</sup> See FLA. STAT. § 381.028 (2005).

<sup>41</sup> However, in 2006, the Fifth District addressed the constitutionality of the statute. See *Florida Hospital Waterman, Inc. v. Buster*, \_\_ So.2d \_\_, (5th DCA 2006), available at 2006 WL 566084. Ultimately, that court determined that Amendment 7 was “self-executing, thus the ‘enabling legislation’ passed by the Legislature (§ 381.028) which effectively eviscerated the Constitutional provision was subordinate to the plain meaning of the Amendment.” Scott R. McMillen, *Fifth DCA Upholds Amendment 7—Patients Right to Know About Adverse Medical Incidents*, 507 ACADEMY FLA. TRIAL LAW.J. 20 (2005). Additionally, the Fifth District certified three questions to the Florida Supreme Court as matters of great public importance:

1) DOES AMENDMENT 7 PREEMPT STATUTORY PRIVILEGES AFFORDED HEALTH CARE PROVIDERS’ SELF-POLICING PROCEDURES TO THE EXTENT

### 3. PUBLIC PROTECTION FROM REPEATED MALPRACTICE

Lastly, Amendment 8 creates a “three strikes” system where Florida now revokes the medical license of any physician found to have committed three or more incidents of medical malpractice.<sup>42</sup> Those supporting the amendment suggest the amendment benefits patients by eliminating repeatedly negligent physicians from practicing medicine in the state. Conversely, those opposing the amendment opine that the amendment limits patients’ access to quality care because practicing physicians in high-risk fields, such as gynecologists, neurosurgeons, and trauma surgeons will leave Florida.<sup>43</sup> Like Amendment 7, the three strikes amendment also required legislative efforts to implement the initiative.<sup>44</sup> In June of 2005, the

THAT INFORMATION OBTAINED THROUGH THOSE PROCEDURES IS DISCOVERABLE DURING THE COURSE OF LITIGATION BY A PATIENT AGAINST A HEALTH CARE PROVIDER?

2) IS AMENDMENT 7 SELF-EXECUTING?

3) SHOULD AMENDMENT 7 BE APPLIED RETROACTIVELY?

*Florida Hospital Waterman*, 2006 WL 566084, at \*9. Almost two years after the passage of Amendment 7, a myriad of issues remain unsolved.

<sup>42</sup> FLA. CONST. art. X, § 26. The amendment reads:

(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:

(1) 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.

(2) 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.

*Id.*

<sup>43</sup> See generally William P. Gunnar, *Is There an Acceptable Answer to Rising Medical Malpractice Premiums?*, 13 ANNALS HEALTH L. 465 (outlining the issues of the present health care crisis by juxtaposing the views of physicians and lawyers).

<sup>44</sup> See FLA. STAT. § 456.50 (2005). This statute reads in pertinent part:

(2) For purposes of implementing s. 26, Art. X of the State Constitution, the board shall not license or continue to license a medical doctor found to have committed repeated medical malpractice, the finding of which was based upon clear and convincing evidence. In order to rely on an incident of medical malpractice to determine whether a license must be denied or revoked under this section, if the facts supporting the finding of the incident of medical malpractice were determined on a standard less stringent than clear and convincing evidence, the board shall review the record of the case and determine whether the finding would be supported under a standard of clear and convincing evidence.

*Id.*

Florida legislature enacted an elucidatory statute establishing a clear and convincing standard for determining whether alleged negligence qualifies as a "strike."<sup>45</sup>

### III. TREATMENT: MAKING AND CHANGING FLORIDA LAW

#### A. *How to Amend by Citizen Initiative*

The medical malpractice amendments, considering their strong political and financial backing, predictably made the 2004 ballot in large part because the prerequisites of placing an initiative on the ballot Florida are not sufficiently stringent.<sup>46</sup> Specifically, the authority to amend the Florida Constitution is expressed in Article XI, Section 3, which reads:

The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the custodian of state records a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts, respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.<sup>47</sup>

Corresponding legislative statutes also govern the initiative process. Ostensibly a bureaucratic nightmare, complying with the myriad of procedural requirements is actually quite feasible.

First, the sponsor of an initiative must register as a political committee with the Florida Division of Elections.<sup>48</sup> But, before this political committee can circulate a petition for signatures, the Secretary of State needs to approve

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<sup>45</sup> See *id.*

<sup>46</sup> Discussed *infra* Part V.

<sup>47</sup> FLA. CONST. art. XI, § 3.

<sup>48</sup> See FLA. STAT. § 100.371(3) (2005); FLA. STAT. § 106.03 (2005). The sponsor needs to file a statement of organization that lists affiliated interest groups, the scope or jurisdiction of the committee or sponsor, the names of principal officers, and certain details about the committee funds. See § 106.03.

the substance and ballot title of the proposed amendment.<sup>49</sup> However, review of the petition applies only to form, and not to its legal sufficiency.<sup>50</sup>

The substance of an amendment must be written in “clear and unambiguous language” before it gains ballot position.<sup>51</sup> The ballot title must be no more than 15 words and the ballot summary detailing the purpose of the amendment must not exceed 75 words.<sup>52</sup> Once the format is approved, the sponsors can start circulating the petition. Some suggest enough money almost guarantees an initiative will at least make the ballot: “There’s a loophole in the Constitution that someone with enough money can use to buy their way through. You can buy signatures for about \$4 million and be guaranteed a spot on the ballot.”<sup>53</sup>

The minimum number of signatures needed for an initiative to be placed on the ballot must equal eight percent of the number of the ballots cast in the last presidential election.<sup>54</sup> When the petition receives 10% of the required signatures, the petition is submitted to the Supervisors of Elections in the appropriate counties for signature verification.<sup>55</sup> After the Supervisor of Elections in the appropriate counties verifies the authenticity of the signatures<sup>56</sup> the Secretary of State submits the petition to the Attorney General.<sup>57</sup>

The Attorney General, in turn, requests an advisory opinion from the Florida Supreme Court regarding compliance with the proposed ballot and

<sup>49</sup> FLA. STAT. § 101.161(2) (2005);

<sup>50</sup> FLA. ADMIN. CODE ANN. r. 1S-2.009(1) (2005).

<sup>51</sup> FLA. STAT. § 101.161(1) (2005).

<sup>52</sup> *Id.*

<sup>53</sup> See Abby Goodnough, *Florida Legislators Take on a Voter Right*, N.Y. TIMES NATIONAL, April 26, 2004. Goodnough cites to Senior Vice President of the Florida Chamber of Commerce who further laments, “All we are asking for are some checks and balances.” *Id.*

<sup>54</sup> FLA. CONST. art. XI, § 3. Moreover, the signatures cannot come from people in only one or two locations; the number must come from at least half of the state’s 25 congressional districts. See also FLA. DEP’T OF STATE, DIV. OF ELECTIONS, INITIATIVE PETITION PROCESS FREQUENTLY ASKED QUESTIONS, <http://election.dos.state.fl.us/initiatives/faq.shtml> (last visited Mar. 23, 2006).

<sup>55</sup> FLA. STAT. § 15.21 (2005). See generally FLA. CONST. art. XI, § 3.

<sup>56</sup> FLA. STAT. § 100.371(4) (2005). See also FLA. STAT. § 99.097 (describing the process for verifying signatures); FLA. ADMIN. CODE ANN. r. 1S-2.0091 (2005) (discussing signature collection verification and deadlines).

<sup>57</sup> The Secretary of State must immediately submit the petition to the Attorney General and to the Financial Impact Estimating Conference if the sponsor (i) registered as a political committee; (ii) submitted the ballot title, substance, and text of the proposed revision or amendment to the Secretary of State; and (iii) obtained a letter from the Division of Elections confirming that the sponsor has submitted to the appropriate supervisors for verification and the supervisors have verified that the forms signed and dated equal to 10 percent of the number of electors statewide and in at least one-fourth of the congressional districts pursuant to the State Constitution. FLA. STAT. § 15.21 (2005).

format requirements.<sup>58</sup> If the Court approves the petition, the proponent can gather the rest of the signatures needed to place the initiative on the ballot. Essentially, the citizen initiative passes through various hands, but at no point does Florida law even allow, let alone require, state officials to review or identify potential deficiencies the substance of the amendments.<sup>59</sup> The aforementioned procedural requirements provide little resistance to a well-funded and determined sponsor with a directive that emanates at least some practicality.

### B. A Second Opinion: Judicial Checks and Balances

Judicial safeguards, in many respects, are also lacking. The Court cannot review the substance of a petition's content (which is somewhat alarming considering there is no executive veto power) and citizen initiatives are not filtered by the rigorous process of committee review or floor debates.<sup>60</sup> At present, the Court reviews initiatives only to determine (1) whether the petition satisfies the single-subject requirement of the Florida Constitution; and (2) whether the ballot title and summary are printed in clear unambiguous language, as required by statute.<sup>61</sup>

<sup>58</sup> The Florida Constitution provides:

The attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion no later than April 1 of the year in which the initiative is to be submitted to the voters pursuant to Section 5 of Article XI.

FLA. CONST. art. IV, § 10. Notably, the April 1 deadline was not implemented until the 2004 election with the passage of a legislatively proposed constitutional amendment. In fact, FLA. STAT. § 16.061 (2005) makes no mention of the new deadline, and reads:

The Attorney General shall, within 30 days after receipt of a proposed revision or amendment to the State Constitution by initiative petition from the Secretary of State, petition the Supreme Court, requesting an advisory opinion regarding the compliance of the text of the proposed amendment or revision with s. 3 Art. XI of the State Constitution and the compliance of the proposed ballot title and substance with s. 101.161. The petition may enumerate any specific factual issues which the Attorney General believes would require a judicial determination.

FLA. STAT. § 16.061 (2005).

<sup>59</sup> See *infra* Part IV.

<sup>60</sup> See, e.g., S.B. 608, 108th Reg. Sess. (Fla. 2005) (amending statute 381.026); STAFF, S. JUDICIARY COMM., ANALYSIS AND ECON. IMPACT STATEMENT, 108-938, Reg. Sess. (Fla. 2005).

<sup>61</sup> See FLA. CONST. art. XI, § 3. See also FLA. STAT. § 101.161(1) which provides:

Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word "yes" and

In addressing these two issues, the Court's inquiry is governed by several general principles. First, the Court does not consider or address the merits or wisdom of the proposed amendment.<sup>62</sup> Second, "[t]he Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people."<sup>63</sup> Essentially, the Court can only invalidate a proposed amendment that is clearly and conclusively defective.<sup>64</sup> The Florida Supreme Court has no choice but to approve well-drafted amendments that comply with these basic tenets,<sup>65</sup> and is constrained from even purporting an opinion as to the potential ramifications of inept initiatives.<sup>66</sup>

## 1. SINGLE-SUBJECT LIMITATION

Florida law requires that an amendment proposed by initiative "shall embrace but one subject and matter directly connected therewith."<sup>67</sup> To comply with this single-subject requirement, a proposed amendment must manifest a "logical and natural oneness of purpose."<sup>68</sup> In essence, the purpose of this requirement is to prevent logrolling<sup>69</sup> and limit the scope of an amendment so it will not institute extreme governmental or constitutional change.<sup>70</sup> Because of this single-subject limitation, the Supreme Court can only keep an initiative off the ballot if (1) it substantially alters or performs the functions of multiple branches of government;<sup>71</sup> (2) it affects other

also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection.

See also, e.g., Advisory Op. to Att'y Gen. *In re* Race in Pub. Educ., 778 So. 2d 888, 890-91 (Fla.2000).

<sup>62</sup> See, e.g., *Pub. Educ.*, 778 So. 2d at 891.

<sup>63</sup> *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982).

<sup>64</sup> See *Advisory Op. to Att'y Gen. In re* Right to Treatment and Rehabilitation for Non-Violent Drug Offenses, 818 So. 2d 491, 498-99 (Fla. 2002).

<sup>65</sup> See *Advisory Op. to Att'y Gen. In re* Patients' Right to Know About Adverse Medical Incidents, 880 So. 2d 617 (Fla. 2004); *Advisory Op. to Att'y Gen. In re* Public Protection From Repeated Malpractice, 880 So. 2d 667 (Fla. 2004); *Advisory Op. to Att'y Gen. In re* The Medical Liability Claimant's Compensation Amendment, 880 So. 2d 675 (Fla. 2004).

<sup>66</sup> See 880 So. 2d at 623 ("[W]e approve the amendment for placement on the ballot. We note, however, that no other issue is addressed here, and this opinion should not be construed as expressing either favor for or opposition to the proposed amendment.").

<sup>67</sup> FLA. CONST. art. XI, § 3.

<sup>68</sup> *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984).

<sup>69</sup> See *Advisory Op. to Att'y Gen. In re* Ltd. Casinos, 644 So. 2d 71, 73 (Fla. 1994) (defining "logrolling" as a practice where an amendment is proposed which contains unrelated provisions that may influence the electorate to pass an otherwise disfavored provision).

<sup>70</sup> See *Norway*, *supra* note 23, at 24. See also *Advisory Op. to Att'y Gen. - Save Our Everglades*, 636 So. 2d 1336, 1340. (Fla. 1994).

<sup>71</sup> See *Advisory Op. to Att'y Gen. In re* Tax Limitation, 644 So. 2d 486, 490 (Fla. 1994).

articles or sections of the constitution;<sup>72</sup> or (3) disparate portions of the initiative do not have a “natural relation and connection as component parts or aspects of a single dominant plan or scheme.”<sup>73</sup>

There are numerous shortcomings with this method of judicial scrutiny. First, a political committee desiring more than one measure merely has to propose separate initiatives to avoid the single-subject requirement.<sup>74</sup> In fact, Floridians for Patient Protection, the political committee affiliated with the Florida Academy of Trial Lawyers, easily skirted the Court’s policy of prohibiting extreme constitutional change by filing eight different petitions in 2004.<sup>75</sup> Two initiatives that committee sponsored, Amendment 7 and Amendment 8, reached the ballot and are now part of the Florida Constitution.<sup>76</sup> The rationale of avoiding extreme constitutional change is meaningless if the Court is powerless to effectively support it.

Also problematic is that nothing prevents multiple parties from proposing citizen initiatives on the identical topic.<sup>77</sup> In 2002, Florida voters narrowly avoided having to choose between two deceptively similar anti-smoking initiatives.<sup>78</sup> Moreover, there is no guarantee that the electorate

<sup>72</sup> *Id.*

<sup>73</sup> *Fine*, 448 So. 2d at 990 (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318, 320 (Fla. 1944)) (“Unity of object and plan is the universal test.”).

<sup>74</sup> See generally Jim Smith, *So You Want to Amend the Florida Constitution? A Guide to Initiative Petitions*, 18 NOVA L. REV. 1509 (1994) (providing an additional overview to methods and procedures of amending the Florida constitution).

<sup>75</sup> See FLA. DEP’T OF STATE, DIV. OF ELECTIONS, INITIATIVES / AMENDMENTS / REVISIONS, <http://election.dos.state.fl.us/initiatives/initiativelist.asp> (last visited Mar. 23, 2006) (Select “2006” as the year, “All” as status, and “Floridians for Patient Protection” as sponsor, then run query.).

<sup>76</sup> FLA. CONST. art. X, § 25, 26.

<sup>77</sup> See *supra* Part I.

<sup>78</sup> The ballot title and summary for FLA. CONST. art. X, § 20 (1968) reads:

Ballot Title: Protect People from the Health Hazards of Second-Hand Tobacco Smoke by Prohibiting Workplace Smoking. Ballot Summary: To protect people from the health hazards of second-hand tobacco smoke, this amendment prohibits tobacco smoking in enclosed indoor workplaces. Allows exceptions for private residences except when they are being used to provide commercial child care, adult care or health care. Also allows exceptions for retail tobacco shops, designated smoking guest rooms at hotels and other public lodging establishments, and stand-alone bars. Provides definitions, and requires the legislature to promptly implement this amendment.

*Id.* The ballot title and summary for the proposed amendment by the committee backed by Philip Morris read:

Ballot Title: Smoking Prohibited in Certain Indoor Workplaces and Restricted in Restaurants and Other Indoor Workplaces. Ballot Summary: This amendment prohibits smoking in certain enclosed indoor workplaces and restricts smoking in restaurants and other enclosed indoor workplaces. It gives business owners or persons in charge of certain enclosed indoor workplaces the ability to designate limited smoking areas, provided the smoking policy is clearly communicated. It exempts non-commercial private residences, retail tobacco shops,

approves one law and strikes down the other, especially if the underlying conflicts are not readily apparent. Even more troublesome is when multiple parties propose ballot initiatives that *indirectly* conflict.<sup>79</sup> In light of the fact that Florida law does not require or encourage public debate over initiatives, voters may be wholly unaware that multiple initiatives dealing with seemingly distinct issues, like the medical malpractice amendments, actually overlap in scope.<sup>80</sup>

## 2. BALLOT TITLE AND SUMMARY

To combat concerns about proper notice to the voting public, the Florida Supreme Court determines whether an initiative's ballot title and summary accurately reflect the purpose and intended consequence of a proposed amendment.<sup>81</sup> In examining the validity of a proposed amendment, the Court looks at (1) whether the ballot title and summary fairly inform the voter of the chief purpose of the amendment,<sup>82</sup> and (2) whether the language of the title and summary, as written, misleads the public.<sup>83</sup> Only in theory do these queries help ensure voters are adequately informed of the effects of a proposed initiative.<sup>84</sup>

In practice, the language of the title and summary are inherently misleading because of the word limitation.<sup>85</sup> Limiting the ballot title is sensible, but attempting to aptly summarize an amendment's purpose and effect in 75 words or less is futile and unnecessarily impractical. As it stands, the Supreme Court has insufficient authority to determine whether an amendment's summary appropriately informs the electorate of both the amendment's short term, and potential long term effects.

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private offices, designated rooms in lodging establishments, and bars. It defines relevant terms.

See FLA. DEP'T OF STATE, DIV. OF ELECTIONS, INITIATIVES / AMENDMENTS / REVISIONS, <http://election.dos.state.fl.us/initiatives/initdetail.asp?account=34830&seqnum=1> (last visited Mar. 6 2006).

<sup>79</sup> See *infra* Part IV.

<sup>80</sup> *Id.*

<sup>81</sup> See FLA. STAT. § 16.061.

<sup>82</sup> See, e.g., Advisory Op. to Att'y Gen. *In re* Right to Treatment and Rehab. for Non-Violent Drug Offenses, 818 So. 2d 491, 497 (Fla. 2002).

<sup>83</sup> See, e.g., Advisory Op. to Att'y Gen. *In re* Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 566 (Fla. 1998).

<sup>84</sup> See, e.g., Advisory Op. to Atty. Gen. *In re* Fairness Initiative, 880 So. 2d 630, 636 (Fla. 2004) (“[W]e have concluded that the proposed amendment violates the single-subject rule ... the proposed amendment operates in a way that could essentially create a tax on services if the Legislature fails to enact specific exclusions ... a voter must be directly informed of such an important consequence.”).

<sup>85</sup> See FLA. STAT. § 101.161(1).



Since the Supreme Court cannot review the merits of a proposed amendment, the voting public is not afforded the benefit of judiciary foresight.<sup>86</sup> This too is problematic in light of the fact that both Amendment 7 and Amendment 8 were not self-implementing initiatives and required legislative clarification before they took effect.<sup>87</sup> Although the medical malpractice amendments survived single-subject scrutiny, there was no procedural safeguard in place to examine the legality of the implementing statutes because they were codified *after* the initiatives were added to the constitution.<sup>88</sup> In essence, the electorate votes on laws that will (in some cases) require implementing statutes which the Court may know in advance will not pass constitutional muster.

#### IV. MISDIAGNOSIS AND RESULTING SIDE EFFECTS

Perhaps the most lacking element of the Florida initiative process is that no law requires disseminating information about potential long-term ancillary effects of passing individual or multiple initiatives. Each medical malpractice amendment in and of itself appeared conflict free and certain to improve the lives of Florida citizens: more money goes to the victim in medical malpractice suits; patients have the right to know if their doctor has been involved in prior instances of malpractice; repeatedly negligent doctors can no longer practice medicine in Florida. Unfortunately, most citizens were unaware of the potential downsides of enacting these initiatives, such as problems with the amendments conflicting with each other, and problems with the amendments individually.

Competing interest groups can (and will) continue to campaign for discordant constitutional amendments. Logic suggests that if two amendments are truly contradictory, the electorate will favor one and fail to vote for the other. This notion overlooks the fact that conflicting amendments may seem facially harmonious. Unfortunately, this happened in 2004 and the

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<sup>86</sup> See *Fine*, 448 So. 2d at 990.

<sup>87</sup> The Supreme Court of Florida enunciated the test for determining whether a constitutional provision is self-executing. The basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. If the provision lays down a sufficient rule, it speaks for the entire people and is self-executing. *Gore v. Bryant*, 125 So.2d 846, 851 (Fla. 1960).

<sup>88</sup> Cf. Thomas Horenkamp, *The New Medical Malpractice Legislation and its Likely Constitutional Challenges*, 58 U.MIA.L.REV. 1285 (2004) (discussing feasible constitutional challenges to the medical malpractice amendments).

medical malpractice amendments passed without sufficient discussions on how to resolve long-term conflicts.

### A. *Counteracting Medications*

For example, one problem Florida citizens failed to sufficiently address was the inevitable clash between Amendment 3 and Amendment 8 within the insurance industry. In short, liability insurance, also called “third party” insurance, covers claims brought against the policyholder.<sup>89</sup> Physicians purchase two types of medical malpractice insurance because of potentially crippling malpractice suits.<sup>90</sup> General indemnity coverage protects against having to pay a judgment while defense coverage safeguards against the insured having to pay the legal costs of defending the underlying claim.<sup>91</sup> The tripartite relationship between the insurer, the insured defendant, and the insurance defense lawyer, however, is hardly symbiotic because multiple parties have competing interests and duties; there are also the interests of the plaintiff to consider.<sup>92</sup>

Citizens passed Amendment 3 to shift damage awards to injured patients and passed the “three strikes” amendment to protect patients from repeatedly negligent doctors. Instead, these amendments exacerbated the strained relationship between litigants in medical malpractice actions and added to the conflict already inherent in liability insurance.<sup>93</sup>

<sup>89</sup> See generally TOM BAKER, *INSURANCE LAW AND POLICY: CASES, MATERIALS, AND PROBLEMS* 409-477 (1st ed. 2003) (providing a broad overview of the general principles of liability insurance).

<sup>90</sup> See Gunnar, *supra* note 43, at 470, 471.

<sup>91</sup> See BAKER, *supra* note 89, at 407.

<sup>92</sup> One potential conflict is when the duties of the insurer under the insurance contract conflict with the duties of the attorney to the client. See generally Ellen S. Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part I—Excess Exposure Cases*, 78 TEX. L. REV. 599 (2000) (providing an overview of one of the potential fields of conflict where adverse judgments may exceed policy limits). The attorney's duty to the insurer (who is paying his bills) may conflict with the duty to the insured (who is a potential defendant). See ROBERT H. JERRY, II, *UNDERSTANDING INSURANCE LAW* 917-918 (3d ed. 2002).

In addition, Tom Baker suggests that when analyzing “the stresses on the liability insurance relationship, it is not enough to think about the professional responsibility triangle (the insurance defense lawyer, the insured defendant, and the liability insurance company). The tort plaintiff must be factored in as well.” BAKER, *supra* note 89, at 562.

<sup>93</sup> Injured plaintiffs will struggle to find representation for medical malpractice claims. U.S. News and World Report reported the findings of the Physician Insurers Association of America in 2002: in a sample of 5524 malpractice cases, 27.4% were settle before trial, 67.7% were dropped or dismissed, 4% ended in a verdict for the defendant, and only 0.9% resulted in jury verdicts for the plaintiff. Christopher H. Schmitt, *A Medical Mistake*, U.S. NEWS & WORLD REP., June 30, 2003, at 24-27. Thus, even in the unlikely event a malpractice case makes it to trial, the injured party only has a 20% chance of a favorable verdict.

A plaintiff's counsel working for a contingency fee is typically compensated one-third of the amount awarded to the injured patient at the time of settlement or jury award. However, the expense is great: on average, the attorney's cost of bringing the case of an injured plaintiff to trial is between \$35,000 and \$50,000.<sup>94</sup> Considering the high cost to litigate, the unlikely result of a favorable outcome, and Amendment 3 now shifting damage awards to the injured patient, attorneys will inevitably pressure clients to settle cases.<sup>95</sup> In that same vein, an attorney can also have clients waive their constitutional rights in Amendment 3. In fact, the Florida Supreme Court recently ordered The Florida Bar to develop a rule providing guidelines for client waiver of the provisions of the medical malpractice amendment reapportioning attorney fees.<sup>96</sup>

Meanwhile, the "three strikes" amendment threatens the livelihood of potential physician defendants<sup>97</sup> and pits defendants against their insurance carriers. Conversely, physicians will invariably opt to settle cases, rather than risk an adverse jury finding of malpractice which could potentially lead to the State revoking their license to practice medicine. Insurance companies generally retain the right to defend a malpractice action,<sup>98</sup> and therein lay

<sup>94</sup> Symposium, *Medical Malpractice: Innovative Practice Applications*, 6 DEPAUL J. HEALTH CARE L. 309, 311 (2003).

<sup>95</sup> See Gunnar, *supra* note 43, at 480.

<sup>96</sup> The three core features are as follows:

1. An acknowledgement of the provisions of article 1, section 26 of the Florida Constitution;
2. An affirmative obligation on the part of an attorney contemplating a contingency fee contract with a potential client to notify any potential client with a medical liability claim of the provisions of article 1, section 26. Such notice provision may include a standard written notice form; and
3. A procedure whereby a medical liability claimant may knowingly and voluntarily waive the rights granted by article 1, section 26. Such a proposed procedure may involve judicial oversight or review of the waiver and may include a standard waiver form or otherwise provide for the protection of the rights of a potential client.

See *In re: Amendment to the Rules Regulating The Fla. Bar—Rule 4-1.5(f)(4)(B) of the Rules of Prof'l Conduct*; Case No. SC05-1150, (Fla. 2005). See also, FloridaBar.org, *Court tell Bar to draft waiver for Amendment 3*, THE FLORIDA BAR NEWS (Jan. 1, 2006) <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/0/f8acc1d4f34df491852570e50054489?OpenDocument> (last visited Jan. 23, 2006); Kenneth D. Kranz, *Cases and Commentaries*, 504 ACADEMY FLA. TRIAL LAW.J. 8 (2005).

<sup>97</sup> FLA. CONST. art. X, § 26.

<sup>98</sup> See BAKER, *supra* note 89, at 508. Douglas Richmond, an insurance defense and coverage lawyer, further explains the benefits of an insurer retaining the right to control the defense in a negligence suit:

Insurers' control of the defense allows them to participate in strategic decisions that might otherwise be made solely by counsel or their insureds. Defense control in a broader sense allows insurer to defeat baseless claims, to expose and defeat overstated claims, to discourage or minimize future litigation against their insureds by defending aggressively and thus

another conflict: the physician wanting to settle to avoid a potential strike versus an insurance company's duty to settle a claim on behalf of its insured.

This Article does not attack the validity or purported value of Amendment 3 or Amendment 8. The real problem is the lack of in-depth analysis that would have allowed Florida citizens to make an informed decision. Of course, citizens may well have enacted the medical malpractice amendments regardless of potential consequences. Still, the myriad of easily identifiable conflicts between these amendments warranted a greater deal of scrutiny from medical, legal, and insurance experts. The present system fails in this respect.

### B. Temporary Relief

In medicine, there is a phenomenon known as the "placebo effect." A patient's symptoms can be alleviated by an otherwise ineffective treatment because the individual expects or believes that it will work.<sup>99</sup> Unfortunately, the Florida electorate supported an ineffective treatment, and despite lofty expectations, Amendment 8 will not amount to a long-term solution. Citizens assumed Amendment 8 would improve Florida's health care system by ridding it of bad doctors. In hindsight, the Florida electorate was fed an empty cure void of any substance.

Physicians have experienced an annual increase in overhead costs to maintain offices, personnel, and malpractice insurance premiums, which have risen dramatically over the past decade with exceptional rate increases in the past two years.<sup>100</sup> Now physicians in Florida are also faced with the possibility of losing their medical license. To avoid liability, physicians will take precautionary measures and practice defensive medicine.<sup>101</sup> This risk-management style of medical practice has resulted in a dramatic increase in the cost of medical care to both the individual patient and society as a whole.<sup>102</sup> The impact of physician shortages will be noticeable for years to come.<sup>103</sup>

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becoming known as a tough adversary or unappealing target.

Douglas Richmond, *Liability Insurer's Right to Defend Their Insureds*, 35 CREIGHTON L. REV. 115, 116 (2001).

<sup>99</sup> The definition of "placebo effect" is available at [http://en.wikipedia.org/wiki/Placebo\\_effect](http://en.wikipedia.org/wiki/Placebo_effect) (last visited January 23, 2006).

<sup>100</sup> See Gunnar, *supra* note 43, at 471.

<sup>101</sup> *Id.*

<sup>102</sup> One study reveals that defensive medicine accounted for five to fifteen billion dollars of unnecessary medical costs per year, primarily through ordering of diagnostic tests for legal, rather than medical purposes. Neville M. Bilimoria, *New Medicine for Medical Malpractice: The Empirical Truth About Legislative Initiatives for Medical Malpractice Reform – Part I*, 27 J. HEALTH L. 268 (1994).

<sup>103</sup> Steven G. Friedman, *Anyone in the O.R.?*, N.Y. TIMES, June 10, 2003, at A29. Dr. Gunnar

Perhaps opposition groups could have campaigned against the passage of Amendment 8 by informing the public of potential side-effects. However, considering that initiatives only need a majority to pass, interest groups probably concluded that it was easier to promote their own amendment (in this case, Amendment 3) rather than spending resources trying to discredit an amendment the group does not support. Too often, citizens are left with a 75-word ballot summary as the primary source of information concerning the present and future application of an initiative. Again, the underlying rationale of removing repeatedly negligent physicians may ultimately prove successful; only time will tell. But the painfully simplistic ballot summary fails to adequately summarize the potential effects of amendments.<sup>104</sup>

### C. *Treating the Disease, Not the Patient*

A complex illness attacks on many fronts, so defenses must be multifaceted; one cannot focus all energies on treatment alone.<sup>105</sup> Amendment 7, spearheaded by Florida trial attorneys, gives patients "access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident."<sup>106</sup> Many defense lawyers and health care professionals actually believe the amendment was proposed in direct response to Amendment 3.<sup>107</sup> Metaphorically speaking, the electorate inadvertently supported Amendment 7 which treats the disease

describes the problems Florida will soon face:

Public access to health care is of considerable concern as increasing numbers of physicians move to states with lower malpractice premium rates, limit their practice to lower risk procedures, or quit altogether. Of future concern to the delivery of healthcare is the negative effect financial expectations and lifestyle considerations have on influencing physician training in the fields of obstetrics and gynecology, general surgery, and surgical subspecialties, particularly neurosurgery, thoracic surgery, and cardiovascular surgery.

Gunnar, *supra* note 43, at 476.

<sup>104</sup> The ballot summary for Amendment 8 stated:

Current law allows medical doctors who have committed repeated malpractice to be licensed in 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.

See FLA. DEP'T OF STATE, DIV. OF ELECTIONS, INITIATIVES / AMENDMENTS / REVISIONS, available at <http://election.dos.state.fl.us/initiatives/fulltext/pdf/35169-8.pdf> (last visited March 23, 2006).

<sup>105</sup> Dr. Lee Jong-wook & James T. Morris, *AIDS: Treat the Patient, Not the Disease*, WHO CONSULTATION ON NUTRITION AND HIV/AIDS, [http://www.sahims.net/doclibrary/Sahims\\_Documents/050412\\_who\\_jk1.doc](http://www.sahims.net/doclibrary/Sahims_Documents/050412_who_jk1.doc) (last visited January 23, 2006).

<sup>106</sup> FLA. CONST. art. X, § 25.

<sup>107</sup> See James Sawran & Robert Weill, *Amendment 7: Will the Patient's Right to Know Come at Too High a Price?*, 24 NO. 2 TRIAL ADVOC. Q. 7 (2005).

(tort reform hindering plaintiff attorneys) instead of the patient (health care as a whole).

Amendment 7 may ultimately decrease the quality of health care because it effectively strips away various statutorily-privileged devices designed to analyze and improve the quality of physicians and treatment.<sup>108</sup> On its surface, Amendment 7 aids injured patients in acquiring vital information concerning potential lawsuits. But the fact that Amendment 7 advocates so easily downplayed the obvious importance of privilege in the medical setting further exhibits the initiative system's shortcomings. Once again, this Article is not critiquing the theoretical advantages of increased discovery for injured patients, but merely suggesting that the initiative process should, at least to some degree, facilitate debate on such obviously crucial issues.

## V. FINDING A CURE

The ancillary effects of the medical malpractice amendments reveal that Florida's citizen initiative process is in a quandary: special interest groups propose self-serving amendments; initiatives are presented to Florida voters without sufficient deliberation; the summarizing text of an initiative can understate its wide-ranging socioeconomic effects; there is no substantive review of the initiatives; enactments of laws that affect everyone only require the support of half the electorate. The procedural and substantive deficiencies are numerous. However, there is a disparity amongst scholars as to the best course of action. Arguably, there are five potential methods of remedying the initiative process: (1) make it procedurally more difficult to amend the constitution; (2) restrict the content of proposed amendments; (3) give a branch of the state government more control over the citizen initiative process; (4) allow citizens to propose statutes by initiative; and (5) increase deliberation about initiative amendments.<sup>109</sup>

There are procedural modifications that can increase the difficulty of placing an amendment on the Florida ballot, especially alterations to the signature requirement.<sup>110</sup> The legislature has the power to shorten the length of time initiative committees have to gather signatures,<sup>111</sup> and could require

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<sup>108</sup> See *id.* at 8 n.29. Florida had numerous privileged review systems including peer review, credentialing, medical review committees, risk management, and quality assurance and patient safety initiatives.

<sup>109</sup> See Ryan Maloney, *Smoking Laws, High-speed Trains, and Fishing Nets a State Constitution Does Not Make: Florida's Desperate Need for a Statutory Initiative*, 14 U. FLA. J.L. & PUB. POL'Y 93, 117 (2002) (identifying four potential categories of remedy).

<sup>110</sup> See *id.* at 117-118.

<sup>111</sup> Signatures in Florida are valid for a period of 4 years. See FLA. STAT. § 100.371(2). This length

a greater percentage of signatures to get an amendment on the ballot.<sup>112</sup> Still, had both of these procedural requirements been in place in 2004, the medical malpractice amendments would have still reached the ballot. Considering interest groups use for-profit signature gatherers, that in some cases will guarantee ballot qualification, the aforementioned procedural modifications would merely raise the cost of placing an amendment on the ballot.<sup>113</sup> As signature-gathering becomes more costly, grassroots groups are hampered by such a burden but national consulting groups that influence, and in some cases manipulate the process, are not.<sup>114</sup> Initiatives were originally conceived for grassroots groups to circumvent legislative bodies that citizens believed were overly influenced by special interest groups. Instituting stricter signature requirements would paradoxically hinder access to the ballot to everyone *but* groups like the Florida Medical Association or Florida Academy of Trial Lawyers.<sup>115</sup> However, as discussed below, a supermajority requirement for the passage of constitutional amendments is an effective procedural method of filtering amendments that only have moderate support of the electorate.<sup>116</sup>

Some scholars support the notion of restricting the content of proposed citizen initiatives. This idea is rooted in the fact that the Florida Constitution is a power-limiting document, not a mere statute with the purpose of regulating private behavior.<sup>117</sup> Unlike the governmental power of the United States which flows directly or impliedly from its Constitution,<sup>118</sup> a state's governmental power is inherent. The Florida Constitution is actually a limitation on that inherent power.<sup>119</sup> One commentator suggests disallowing all citizen initiatives that seek to "accomplish a purpose that is within the power of the Florida Legislature to accomplish by law."<sup>120</sup> Although this

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of time exceeds all other states with a constitutional initiative process. See Maloney, *supra* note 110, at 118.

<sup>112</sup> FLA. CONST. art. XI, § 3. Discussed *supra* Part III(A).

<sup>113</sup> See Jameson & Hosack, *supra* note 19, at 446. Some initiative committees pay professional signature gatherers up to \$2.50 a signature. *Id.* at 448.

<sup>114</sup> See NOVEMBER 8 MEETING: CONSTITUTIONAL AMENDMENT PROCESS IN FLORIDA—CITIZEN INITIATIVE, <http://web.clas.ufl.edu/askew/meeting/Fall2002memo.pdf> (last visited May 10, 2006).

<sup>115</sup> See Jameson & Hosack, *supra* note 19, at 446.

<sup>116</sup> See *infra* Part V(A)(1).

<sup>117</sup> See Joseph W. Little, *Does Direct Democracy Threaten Constitutional Governance in Florida?*, 24 STETSON L. REV. 393, 409-410 (1995).

<sup>118</sup> See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

<sup>119</sup> JOHN F. COOPER & THOMAS C. MARKS, JR., *FLORIDA CONSTITUTIONAL LAW: CASES AND MATERIALS* 1 (3d. ed. 2001). Consequentially, a statute enacted by the legislature may not restrict a right granted under the Constitution. See *Austin v. Christian*, 310 So.2d 289, 293 (Fla. 1975).

<sup>120</sup> See Little, *supra* note 117, at 410. Little rationalizes this substantive limitation on constitutional amendments:

prevents interest groups from proposing initiatives like the medical malpractice amendments, it runs contrary to the very reason Florida instituted the citizen initiative in the first place: allowing citizens to circumvent the legislature when elected officials perceivably fail to address certain issues through legislation.<sup>121</sup> Another scholar advocates prohibiting initiatives that involve limited economic or social interests, and recommends the Supreme Court of Florida have jurisdiction to determine whether an initiative proposal involves such a limited interest.<sup>122</sup> Implementing this restriction is arguably unlawful, and markedly improbable. First, increasing the present jurisdiction of the Florida Supreme Court<sup>123</sup> to include the authority to restrict amendments on the basis of merit seems an impermissible restriction of the separation of powers doctrine. Second, a proposal to exclude certain initiatives requires modifying the current constitution and thus needs the approval of Florida voters.<sup>124</sup> It is unlikely the electorate will limit their power of direct democracy in light of the overwhelming support of citizen initiatives in recent years.

For these same reasons, it is doubtful the electorate will grant a branch of the state government more control over the initiative process.<sup>125</sup> However, executive, judicial, or legislative scrutiny might be welcomed if the specific branch was afforded non-binding authority to merely opine the merits and wisdom of an amendment. Regarding the executive branch, some suggest a review of proposed initiative language by a state agency that could include non-binding suggestions for improving an initiative's technical format and

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[T]he constitution is not a vehicle for making positive law, but it is an instrument to limit and control what laws the government shall have the authority to make and what powers the government shall be permitted to exercise. This being true, to burden the constitution with provisions that are merely legislative in nature (i.e., to impose a particular tax, to authorize a particular form of gambling, or to prohibit a particular kind of fishing) is a misuse of the document and of the principle of American state constitutionalism.

*Id.*

<sup>121</sup> *Id.* at 399.

<sup>122</sup> See Daniel R. Gordon, *Protecting Against the State Constitutional Law Junkyard: Proposals to Limit Popular Constitutional Revision in Florida*, 20 NOVA L. REV. 413, 429 (1995) (suggesting the 1998 Constitutional Revision Commission implement ways to inhibit the initiative process in Florida). In addition to restricting self-serving economic and social changes, Gordon also suggested the approval of 60% of electors for initiatives involving changes to article I, to article X, section 4, or to any initiative that the Supreme Court of Florida in its pre-election review deems will limit equality or equal protection. *Id.*

<sup>123</sup> FLA. CONST. art. V, § 3.

<sup>124</sup> FLA. CONST. art. XI, § 5.

<sup>125</sup> See Maloney, *supra* note 109, at 121 ("This is evinced by the fact that, in 1994, the people of Florida voted to enlarge their power to propose constitutional amendments, approving a citizen initiative amendment which exempted any future initiative 'limiting the power of government to raise revenue' from the single subject requirement.").



content.<sup>126</sup> In that same vein, allowing the Supreme Court to discuss potential ramifications of such amendments in their advisory opinions might prove effective. It certainly would have allowed the Florida Supreme Court to voice its opinions as to the potential long term ramifications of the medical malpractice amendments. Concerning the Legislature, an indirect constitutional initiative process, although uncommon, might have alleviated some of the problems in the 2004 election.<sup>127</sup> Indirect processes require that initiatives are submitted to the Legislature before being placed on the ballot.<sup>128</sup> In Mississippi, for example, the Legislature can adopt, amend, or reject an initiative, but the initiative still goes on the ballot.<sup>129</sup> If the Legislature alters the initiative, both proposals go on the ballot and voters get to choose between them.<sup>130</sup>

Although each governmental branch potentially has the ability to filter the content of initiatives, it requires the difficult process of convincing the Florida electorate to allow a governmental body to interfere with its lawmaking ability. Instead, this Article proposes more feasible changes: (1) increase the approval percentage required to pass a constitutional initiative; (2) increase the length of the ballot summary to more than 75 words; (3) adopt a statutory process; and (4) develop ways to improve debate, deliberation, and compromise on initiatives.<sup>131</sup> A statutory initiative coupled with increased voter knowledge alleviates many problems.

### A. Preventative Medicine

## 1. PROCEDURAL MODIFICATIONS

First, initiatives should require a higher percentage of voter approval. "It is hard to amend the Constitution and it ought to be hard."<sup>132</sup> Gaining the support of the majority of the electorate, however, would be difficult considering such an amendment limits citizen access to direct democracy.<sup>133</sup> Yet, the desire to protect the integrity of the constitution, coupled with the

<sup>126</sup> See NOVEMBER 8 MEETING: CONSTITUTIONAL AMENDMENT PROCESS IN FLORIDA – CITIZEN INITIATIVE, <http://web.clas.ufl.edu/askew/meeting/Fall2002memo.pdf> (last visited May 10, 2006).

<sup>127</sup> See Jameson & Hosack, *supra* note 19, at 434.

<sup>128</sup> *Id.*

<sup>129</sup> MISS. CONST. art. 15, § 273. The Mississippi Constitution also limits the number of initiatives on one ballot to five. *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See NOVEMBER 8 MEETING: CONSTITUTIONAL AMENDMENT PROCESS IN FLORIDA – CITIZEN INITIATIVE, <http://web.clas.ufl.edu/askew/meeting/Fall2002memo.pdf> (last visited May 10, 2006).

<sup>132</sup> Weber v. Smathers, 338 So.2d 819, 824 (Fla. 1976) (Roberts, J., dissenting).

<sup>133</sup> See Jameson & Hosack, *supra* note 19, at 445.

skepticism of others' attempts to amend it, may influence enough citizens to pass such an amendment.<sup>134</sup> Depending on the percentage, perhaps this alone would not have prevented the controversial medical malpractice amendments from passing, since all received greater than 60% of the vote.<sup>135</sup> But, the supermajority requirement encourages the creation of a popular consensus and ensures strong public support for any and all constitutional changes.<sup>136</sup>

The second procedural modification this Article suggests better provides the Florida electorate with information about the direct and ancillary affects of citizen initiatives. It is within the power of the Legislature to modify the ballot title and summary requirement.<sup>137</sup> Arguably, the fact that the ballot summary is limited to 75 words does not allow drafters to sufficiently convey the sum and substance of an amendment to the voting public. Perhaps more importantly, the ballot summary is drafted by the initiative sponsor, rather than an independent party, further increasing the risk of a potentially misleading summary. Florida law needs to have an independent third party, or a committee of both proponents and opponents, draft explanatory statements for initiatives.<sup>138</sup>

## 2. CREATING A STATUTORY INITIATIVE

The constitution is supposed to be the bastion of Florida law, not a testing ground for new laws. The lack of a statutory initiative compels citizens to enact amendments that are more appropriate as statutory measures.<sup>139</sup> If Florida citizens are provided an alternative avenue to direct democracy, like a statutory initiative, they may be more inclined to approve the implementation of restrictions on amendments by initiatives.

However, in implementing a statutory initiative, scholars recognize that various issues come into play, such as the direct or indirect nature of the process, the roles of the other branches of government in reviewing and

<sup>134</sup> *Id.*

<sup>135</sup> See "A Look at the Trend of Ballot Initiatives," *supra* note 24.

<sup>136</sup> See Gordon, *supra* note 122, at 429. Gordon further suggests that increasing the majority requirement would discourage initiatives because it would make ultimate electoral success more difficult.

<sup>137</sup> FLA. STAT. § 101.161(1) ("[T]he substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure.")

<sup>138</sup> See NOVEMBER 8 MEETING: CONSTITUTIONAL AMENDMENT PROCESS IN FLORIDA – CITIZEN INITIATIVE, <http://web.clas.ufl.edu/askew/meeting/Fall2002memo.pdf> (last visited May 10, 2006) ("For example, a law recently enacted in Oregon requires a committee of five ... to draft the explanatory statement for the initiative or referendum, to be included in the voters' pamphlet.").

<sup>139</sup> See Jameson & Hosack, *supra* note 19, at 458.

approving proposals, and the appropriate procedural requirements.<sup>140</sup> The signature requirement must require fewer signatures than a constitutional initiative to incentivize sponsors to seek statutory changes, rather than amendments.<sup>141</sup> An indirect statutory initiative method might alleviate many of the problems evinced by the conflicting medical malpractice amendments. But, a direct statutory initiative is a better compromise considering citizens can already amend the constitution directly. A direct statutory initiative with a lower voting requirement than a direct constitutional initiative would undoubtedly curtail the number of amendment initiatives filed each year.

### B. Palliative Care

Palliative care is basically treating a disease for which there is no cure. Had a statutory initiative been available and more stringent voting requirements in place in 2004, the problematic medical malpractice amendments might still have gained the favor of Florida voters. Initiative proposals do not go through the same hearing process as amendments by the legislature, or the constitutional revision commission, so voters only learn about the benefit or detriment of the proposals through the media or advertising. Florida already assists voters by providing information about the initiative process on the website for the Florida Department of State.<sup>142</sup> But, there is no law requiring publication of voter information pamphlets; it is left to the discretion of counties.<sup>143</sup> Florida should initiate public hearings, and require the publication and dissemination of voter information pamphlets to improve debate, deliberation, and compromise on initiatives.<sup>144</sup> Ideally, the creation of a statutory initiative would also further public participation and debate.<sup>145</sup>

## VI. CONCLUSION

Thomas Jefferson said, "I know of no safe depository of the ultimate powers of society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but inform their discretion."<sup>146</sup> If

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<sup>140</sup> See *id.* at 459.

<sup>141</sup> *Id.*

<sup>142</sup> See FLA. DEP'T OF STATE, DIV. OF ELECTIONS, <http://election.dos.state.fl.us/index.html> (last visited Apr. 12, 2006).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> See Jameson & Hosack, *supra* note 19, at 460.

<sup>146</sup> "Trust for Representative Democracy Quotes," <http://www.ncsl.org/public/trust/quotes.htm>

anything, the medical malpractice amendments do not evidence a misguided electorate, but rather a faulty process of self-governance. The 2004 election does not warrant the total removal of constitutional initiatives. Instead, it necessitates improving Florida's system of amending the constitution.

By instituting a supermajority and a statutory initiative process, citizens still have recourse against the legislature when it fails to enact desired legislation.<sup>147</sup> Such a system encourages the use of the statutory initiative rather than the constitutional initiative, thereby preserving the sanctity of the Florida Constitution without significantly threatening the electorate's right to a direct democracy. In addition, removing the 75 word limitation on the ballot summary, coupled with the public hearings and the dissemination of voter information pamphlets helps ensure voters are properly informed of the true merits and potential outcomes of all proposed initiatives. Most importantly, despite the present fallbacks of the citizen initiative process, and the questionable value of the medical malpractice amendments, there is comfort knowing the ultimate powers of society rest in the people themselves.

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(last visited May 11, 2006).

<sup>147</sup> See Little, *supra* note 117, at 411-412.

