

**THREE STRIKES AND WE'RE ALL OUT: FLORIDA'S FAULTY
CONSTITUTIONAL AMENDMENT TARGETING PHYSICIANS**

JOSHUA CLAYBOURN*

INTRODUCTION

As medical malpractice suits and insurance premiums rise, the public's perception of malpractice and the healthcare system changes. States have responded in a number of different ways. Approximately half of the states have adopted screening or arbitration panels which determine whether a particular claim has sufficient merit to proceed through the judicial system. The most popular form of malpractice tort reform is a verdict cap on non-economic damage awards and/or the punitive damage cap or multiplier. Some states have required a "certificate of merit" whereby a medical malpractice plaintiff must certify, usually through an expert report, that the claim has merit. Other reforms include a "three strikes and you're out" policy to prevent frivolous lawsuits, whereby an attorney can no longer practice after filing three lawsuits deemed frivolous.

Most recently, a very different kind of "three strikes and you're out" proposal has come to the forefront of medical malpractice reform. Under a recently passed constitutional amendment in Florida,¹ doctors will lose their medical license if they are found responsible for malpractice three times, either by courts, arbitrators, the medical board or state administrative judges. Given the enormous implications that this newest "three strike" reform will have on medical care and malpractice suits, it is vitally important to examine both the legal and policy ramifications.

* J.D. Candidate, 2006, Indiana University School of Law – Indianapolis; Executive Articles Editor, *Indiana Health Law Review*, Vol. 3; B.S., 2003, Indiana University.

¹ Florida Department of State, Division of Elections, *at* <http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/2/04&DATAMODE=> (last visited March 10, 2005).

First, I will examine malpractice suits and damage awards, and the various reforms that Florida has adopted as a response. Second, I will explore the justification behind Florida's new "three strikes and you're out" law against doctors, including its potential impact on malpractice insurance. Third, I will explore the disadvantageous constitutional and legal aspects of Amendment 8, including the roadblocks that must be overcome for implementation. Fourth, I will highlight the significant policy disadvantages to the new law. Finally, I will determine if a "three strikes" law is an appropriate component of medical malpractice reform.

I. THE MEDICAL MALPRACTICE "CRISIS"

A. Awards Skyrocketing

Analysts tend to agree that the medical liability system is deeply flawed.² The median medical liability award in medical liability cases soared by 114% from 1996 to 2002, topping one million dollars.³ Even though the overall compensatory jury-award median for personal injury cases fell thirty percent in 2002, the compensatory jury award median for medical malpractice cases has increased from 2000 to 2003, albeit at a much slower rate than the previous three years.⁴ Indeed, the percentage of one million dollar or more medical-malpractice verdicts remained the same from 1999 through 2002 at fifty-two percent.⁵ From 1996 to 2003, the plaintiff recovery rate (ratio of plaintiff verdicts to total verdicts) increased from twenty-nine percent to forty-two percent.⁶ While frequency

² Steve Lohr, *Bush's Next Target: Malpractice Lawyers*, N.Y. Times, Feb. 27, 2001, at 31.

³ Jury Verdict Research, *Current Award Trends in Personal Injury* 18 (43ded. 2004).

⁴ Gary Bagin, *Jury Verdict Research Releases Verdict Survey*, Jury Verdict Research News Release (April 1, 2004), available at http://www.juryverdictresearch.com/Press_Room/Press_releases/Verdict_study/verdict_study8.html.

⁵ *Id.*

⁶ *Id.*

of lawsuits appears to be leveling off, severity is still at all-time highs.⁷ Company officials, while admitting the frequency of suits is leveling off, are still very worried about severity of awards and their effects on profits.⁸

B. Effect on Malpractice Insurance Premiums

Although the degree to which malpractice suits influence medical malpractice insurance premiums is hotly debated,⁹ all parties agree that malpractice suits at least play a contributing role.¹⁰ In 2003, many states witnessed insurance premiums rising by more than twenty-five percent.¹¹ In 2004 increases leveled off in the seven to twenty-five percent range, but at “historically high amounts.”¹²

C. Perception of Malpractice “Crisis”

Whether there is in fact a medical malpractice “crisis,” and the degree to which it influences malpractice insurance premiums, will remain a hotly contested subject. But for purposes of this note it is only necessary to observe that there is a perceived problem.

⁷ *Medical Liability Monitor*, MEDICAL LIABILITY MONITOR (Media Report, Chicago, IL), Oct. 22, 2004, at 2.

⁸ *Id.*, at 5.

⁹ See Mimi Marchev, Nat'l Acad. for State Health Policy, *The Medical Malpractice Insurance Crisis: Opportunity for State Action* (July 2002), available at http://www.nashp.org/_docdisp_page.cfm?LID=05181D11-A4A8-11D6-BD1700A0CC76FF4C (“Insurers and doctors blame ‘predatory’ trial attorneys, ‘frivolous’ law suits, and ‘out of control’ juries for the spike in insurance premiums. In turn, consumer groups accuse insurance companies of ‘price gouging,’ while plaintiffs’ attorneys point to an exorbitant rate of medical errors and the need to deter malpractice and provide compensation to injured patients.”).

¹⁰ U.S. Gen. Accounting Office (GAO), Pub. No. GAO-03-702, Report to Congressional Requesters, *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates* (June 2003), available at <http://www.gao.gov/new.items/d03702.pdf>.

¹¹ Berkeley Rice, *How High Now? Premium Hikes of 25 Percent or More Are Now Common, with More Double-Digit Increases Expected for 2004*, MED. ECON., Jan. 9, 2004.

¹² *Medical Liability Monitor’s annual rate survey*, MEDICAL LIABILITY MONITOR (Media Press Release), Oct. 22, 2004. The Medical Liability Monitor is a newsletter that, among other things, publishes the results of its annual surveys of the premium rates of medical malpractice insurers. The surveys, which are sent to medical malpractice insurers, request premium rates for each state or smaller region for a standard amount of coverage in three specialties – internal medicine, general surgery, and obstetrics/gynecology. The Medical Liability Monitor selected these in order to have data representative of low-, medium-, and high-risk specialties. All 50 states were represented in the rate information that companies provided. The premium rates collected in the survey are base rates that do not reflect the discounts or the additional amounts insurers charge, so actual premium rates can vary from the premium rates given in the survey.

The perception of skyrocketing insurance premiums contributes to the impression among physicians that they're being targeted unfairly.¹³ Sixty-two percent of medical residents reported that liability issues were their top concern, surpassing any other concern, and representing an increase of over three fold from 2001.¹⁴ This perception is particularly strong in Florida, causing the American Medical Association (AMA) to list the state as one of twenty with a malpractice "crisis" situation.¹⁵ Along with a wide variety of factors and available sources, the AMA considered newspaper and other anecdotal reports,¹⁶ reinforcing the notion that a strong perception of "crisis" exists. When states target doctors through constitutional amendments, the perception deepens, and the "crisis" intensifies.

D. *Florida's Early Attempts at Reform*

In 1975 the Florida legislature passed the Comprehensive Medical Malpractice Reform Act,¹⁷ which aimed to correct the cost of medical malpractice insurance, discourage frivolous malpractice suits, and improve access to health care.¹⁸ Among other things, this Act made it harder to bring a malpractice suit by requiring a claimant to

¹³ See Alan Feigenbaum, *Special Juries: Deterring Spurious Medical Malpractice Litigation in State Courts*, 24 CARDOZO L. REV. 1361, 1372 (2003) (noting "Medical malpractice lawsuits have produced feelings in physicians of being singled out and placed in a negative public light."); *Patients, Physicians, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York*; The Report of the Harvard Medical Practice Study to the State of New York 9-1 (1990) (noting that the overall perceived risk of being sued was nineteen and a half percent, three times the actual risk).

¹⁴ Meritt, Hawkins & Assoc., Summary Report: 2003 Survey of Final Year Med. Residents 5 (2003).

¹⁵ Am. Med. Ass'n, *America's Medical Liability Crisis: A National View* (2004), at <http://www.ama-assn.org/ama/noindex/category/11871.html>. Other states are Arkansas, Connecticut, Georgia, Illinois, Kentucky, Massachusetts, Mississippi, Missouri, New Jersey, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Washington, West Virginia, and Wyoming. The primary factor in the AMA analysis is the degree to which patients have lost access to medical care. *Id.*

¹⁶ *Id.*

¹⁷ Codified as FLA. STAT. ch. 769.133 (1975).

¹⁸ See Chapter 86-160, LAWS OF FLORIDA, known as the "Tort Reform and Insurance Act of 1986." For a substantial legislative history concerning this act, including an extensive report, see Florida Senate Commerce Committee, *A Review of Historical Analysis--Current Perspectives on the Doctrine of Joint and Several Liability and a Review of Tort Reform* (1986).

submit any action before a mediation panel before filing it with the clerk of court.¹⁹ It also allowed a judge to adjust a jury award²⁰ and set up a “Patient’s Compensation fund” to cover losses exceeding the limits of malpractice policies.²¹

In 1985 the Act was amended to include a \$450,000 cap on non-economic damage awards,²² as well as a pre-suit screening procedure that involved arbitration.²³ However in 1987 the cap on non-economic damages was declared unconstitutional by the Florida Supreme Court.²⁴ Nevertheless, there remains a \$250,000 cap on non-economic damages in voluntary binding arbitration, which can then be reduced by other factors.²⁵ Moreover, refusing to enter into arbitration can bring consequences to a litigant.²⁶

In sum, despite the setback for Florida’s Comprehensive Medical Malpractice Reform Act, there remain hurdles to bringing frivolous medical malpractice claims in Florida, both through non-economic damage caps and through other means.

II. AMENDMENT EIGHT PROVISIONS

A. *The Initiative*

¹⁹ FLA. STAT. ch. 768.44 (1976).

²⁰ FLA. STAT. ch. 768.49 (1976).

²¹ FLA. STAT. ch. 768.54 (1976).

²² FLA. STAT. ch. 766.202 (1993). This cap did not survive constitutional scrutiny in *Smith v. Dep’t of Ins.*, 507 So. 2d 1080 (Fla. 1987) on the grounds that it was a violation of a claimant’s right of access to the courts.

²³ FLA. STAT. ch. 768.495, 768.575 (1985).

²⁴ *Smith v. Dep’t of Ins.*, 507 So. 2d 1080 (Fla. 1987) (concluding that the caps were a violation of a claimant’s right of access to the courts).

²⁵ FLA. STAT. ch. 766.207 (2002). Damages are reduced in percentage terms by the plaintiff’s capacity to enjoy life. Therefore, a plaintiff whose capacity to enjoy life has been cut by twenty percent may only recover \$200,000 in non-economic damages through arbitration.

²⁶ FLA. STAT. ch. 766.209 (1995). For the plaintiff, refusing arbitration results in capping non-economic damages at \$350,000. For the defendant, it results in the award of interest and attorneys’ fees if the plaintiff prevails at trial.

It was in this controversial and reform-oriented environment that the “Floridians for Patient Protection”²⁷ (FPP) proposed an amendment, titled “Amendment 8” and often called the “Three Strikes Amendment,” prohibiting medical doctors who have been found to have committed three or more incidents of medical malpractice from being licensed to practice medicine in Florida.²⁸ The Floridians for Patient Protection (FPP) is an organization supported by the Academy of Florida Trial Lawyers,²⁹ which raised over \$20 million to support this and other similar amendments.³⁰ Central to the backers’ claim was that patients were threatened by inept doctors, but patient protection was not the only justification offered by the amendment’s proponents. The FPP and others consistently argue that the amendment will lower medical malpractice insurance for doctors by removing those most responsible for litigation.³¹

Amendment 8’s official title on the ballot read, “Public Protection From Repeated Malpractice.”³² The actual text of the amendment on the ballot, and the wording that voters approved, reads as follows:

a) Statement and Purpose:

²⁷ Floridians for Patient Protect (FPP) is a patient advocacy and rights group formed as a political action committee that was initially created to file two constitutional amendments. The organization remained to pursue legislative changes. Floridians for Patient Protection, *Who We Are*, available at <http://www.floridiansforpatientprotection.org/board.html> (last visited January 30, 2005). In its push for Amendment 8, FPP was supported by the Academy of Florida Trial Lawyers. Drew Douglas, *Judge Enjoins Implementation of Amendment Barring Licensure of ‘Three Strike’ Physicians*, 13 BNA HEALTH LAW REP. 46 (Nov. 18, 2004).

²⁸ Floridians for Patient Protection, *Vote Yes on Amendments 7 & 8* (last visited Nov. 20, 2004), available at <http://www.floridiansforpatientprotection.org/voteYes.html>.

²⁹ Drew Douglas, *Judge Enjoins Implementation of Amendment Barring Licensure of ‘Three Strike’ Physicians*, 13 BNA HEALTH LAW REP. 46 (Nov. 18, 2004).

³⁰ Insurance Journal, *Florida’s Amendment 2 Means Lawyer’s Will Get Less for Malpractice Cases*, Nov. 2, 2004, available at <http://www.insurancejournal.com/news/southeast/2004/11/03/47414.htm>.

³¹ Position Paper, *Solving the Medical Malpractice Crisis: It’s Time to Listen to the Victims*, Floridians for Patient Protection, September 2004 (citing Stephen C. Schoenbaum & Randall R. Bovbjerg, *Malpractice Reform Must Include Steps to Prevent Medical Injury*, 140 ANNALS INTERNAL MED. 51, 51 (2004)).

³² Florida Department of State, Division of Elections, available at <http://election.dos.state.fl.us/initiatives/fulltext/35169-8.htm> (last visited March 10, 2005).

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 from the void portion and given the fullest possible force and application.³³

B. Initial Constitutional Challenges

The Amendment came before the Florida Supreme Court even before election day because the Florida Attorney General asked for an advisory opinion as to its constitutionality.³⁴ The advisory opinion determined whether the proposed amendment violated the single-subject³⁵ and ballot title and summary³⁶ standards. An amendment must be allowed on the ballot unless it is “clearly and conclusively defective,”³⁷ but there

³³ *Id.*

³⁴ *In re Advisory Op. to Att’y Gen. re Public Protection from Repeated Malpractice*, 880 So.2d 667 (Fla. 2004).

³⁵ Article XI, Section 3, Florida Constitution provides:

Section 3: Initiative – 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.*

Emphasis added.

³⁶ FLA. REV. STAT. § 101.161(1) (2003) provides:

(1) 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 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. The wording of the substance of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the joint resolution, constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. Except for amendments and ballot language proposed by joint resolution, *the 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. . . The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.*

Emphasis added.

³⁷ *Askew v. Firestone*, 421 So.2d 151, 156 (Fla. 1982) (“the court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people.”).

are still rules which apply and which must be met before an amendment can be put before the people.³⁸

The amendment's opponents argued, among other things, that it violated the single-subject requirement because it substantially alters or performs the functions of multiple aspects of government.³⁹ The court concluded that the "effects on the legislative and executive branches are not sufficiently substantial to constitute the type of 'multiple "precipitous" and "cataclysmic" changes' that the single-subject requirement is designed to prevent."⁴⁰ Moreover, the amendment did not "substantially alter or perform the functions of the judiciary."⁴¹ The court also determined that the ballot title did "not exceed fifteen words, that the ballot summary not exceed seventy-five words, and that the two 'state in clear and unambiguous language the chief purpose of the measure.'"⁴²

However, the Florida Supreme Court approved the proposed amendment by the narrowest of margins, by a four to three vote.⁴³ Whether the initiative met the requirements for an amendment remained a controversial and disputed issue.

³⁸ For example, if the ballot includes more than one subject or impacts more than one governmental power it must be rejected. *Advisory Op. to the Att'y Gen. re: Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So.2d 888, 892 (Fla. 2000). Also, amendments which do not provide the voters with enough information to know what they are voting for cannot be allowed to stand. *Advisory Op. to Att'y Gen. re: Term Limits Pledge*, 718 So.2d 798, 804 (Fla. 1998).

³⁹ Initial Brief of Opponent, *In re Advisory Op. to Att'y Gen. re Public Protection from Repeated Malpractice*, 880 So.2d 667, 669 (Fla. 2004).

⁴⁰ *In re Advisory Op. to Att'y Gen. re Public Protection from Repeated Malpractice*, 880 So.2d 667, 669 (Fla. 2004) (quoting *Advisory Op. to Att'y Gen. re Fish & Wildlife Conservation Comm'n*, 705 So.2d 1351, 1353 (Fla.1998)).

⁴¹ *In re Advisory Op. to Att'y Gen. re Public Protection from Repeated Malpractice*, 880 So.2d 667, 670 (Fla. 2004).

⁴² *In re Advisory Op. to Att'y Gen. re Public Protection from Repeated Malpractice*, 880 So.2d 667, 670 (Fla. 2004) (citing FLA. REV. STAT. § 101.161(1) (2003)). Cf. *Askew v. Firestone*, 421 So.2d 151, 154-55 (Fla.1982).

⁴³ *Id.*

Nevertheless, when voters approved the amendment 71.1 percent to 28.9 percent, it was set to become Section 26 of Article X of the Florida Constitution.⁴⁴

III. THREE STRIKE AMENDMENT JUSTIFICATIONS

A. *A Dichotomy of Doctors*

It is not hard to find reasons why Amendment 8 enjoyed such widespread support among Florida citizens. According to the Institute of Medicine of the National Academy of Sciences, 98,000 deaths each year are caused by preventable medical errors.⁴⁵ If medical errors were recognized as a cause of death by the Centers for Disease Control & Prevention (CDC) in its annual National Vital Statistics Report, medical errors would be ranked as the sixth leading cause of death in the United States and outrank deaths due to breast cancer, AIDS, motor vehicle accidents, diabetes, influenza and pneumonia, Alzheimer's disease, and renal disease.⁴⁶

Clearly there is an arguable problem nationally, but Florida carries its own concerns as well. According to the Washington, D.C.-based consumer advocacy group Public Citizen, "6.2 percent of Florida doctors had two or more malpractice payouts from 1990 and 2002. Those doctors were responsible for more than half the settlements and jury awards."⁴⁷ Public Citizen, deriving from data in the federal National Practitioner Data Bank, adds that "just 2.2 percent of all doctors have made three or more malpractice

⁴⁴ Florida Department of State, Division of Elections, *available at* <http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/2/04&DATAMODE=> (last visited January 30, 2005). This section, originally designated section 20 by Amendment No. 8, 2004, proposed by Initiative Petition filed with the Secretary of State April 7, 2003, adopted 2004, was redesignated section 26 in order to avoid confusion with already existing section twenty, relating to prohibiting workplace smoking.

⁴⁵ Study Release, *Patient Safety in American Hospitals*, HEALTH GRADES, July 2004 at 1, 2. *Medical error* is defined as "the failure of a planned action to be completed as intended or the use of a wrong plan to achieve an aim. . . [including] problems in practice, products, procedures, and systems." *Id.*

⁴⁶ *Id.* at 1. See also Steve Lohr, *Bush's Next Target: Malpractice Lawyers*, N.Y. Times, Feb. 27, 2001, at 31.

⁴⁷ Editorial, "Proposal Would Harm Patient," SARASOTA HERALD-TRIBUNE, Sept. 14, 2003.

payouts, amounting to 25.8 percent of all malpractice payouts in the state.”⁴⁸ The Academy of Florida Trial Lawyers, another of the amendment’s advocates, argued the reform was a way to protect patients from “dangerous doctors” and consistently pointed to the Public Citizen study which found over half of medical malpractice in Florida is committed by only six percent of the doctors.⁴⁹ Public Citizen found twenty-three Florida physicians who had committed ten or more instances of medical malpractice between 1990 and 2002.⁵⁰ The Floridians for Patient Protection also noted four physicians who between them had 65 specific instances of medical malpractice in 12 years.⁵¹ This perceived dichotomy between “the good” and “the bad” doctors fueled much of the amendment’s support.

B. State Inaction

Advocates also argued that the problem was not necessarily an abnormally high amount of inept or unskilled doctors in Florida, but rather it was rooted in inaction by the state of Florida in disciplining poor doctors. Under current law, discounting Amendment 8 currently under review, the Florida Department of Health may revoke or suspend the license to practice medicine of any physician, *inter alia*, “[g]ross 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

⁴⁸ Public Citizen, News Release, “New 2002 Government Data Dispute Malpractice Lawsuit ‘Crisis’ in Florida” (July 8, 2003), available at http://www.citizen.org/documents/FL_NPDB.pdf.

⁴⁹ Public Citizen, *Florida’s Real Medical Malpractice Problem: Bad Doctors and Insurance Companies, Not the Legal System*, September 2002, available at <http://www.citizen.org/documents/FLAreport.pdf>.

⁵⁰ *Id.*

⁵¹ Initial Brief of Sponsor, Floridians of Patient Protection, *In re Advisory Op. to Att’y Gen. re Public Protection from Repeated Malpractice*, 880 So.2d 667 (Fla. 2004).

conditions and circumstances.”⁵² In the Florida Department of Health’s annual report to the legislature, a footnote explains that “[t]he Department [of Health] is required to investigate reports of closed medical malpractice claims against medical, osteopathic or podiatric physicians when there are 3 or more received within a 5 year period with an indemnity paid in excess of \$25,000 each [*sic*].”⁵³ This is known as Florida’s “3 in 5” rule and governs when the state may revoke a physician’s license.

This power, however, is not always used. According to Public Citizen, “Only 13.8 percent (199 of 862) of Florida doctors who made three or more malpractice payouts have been disciplined.”⁵⁴ Dr. Sidney Wolfe, director of Public Citizen's Health Research Group, notes, “Arizona disciplines about three and a half times as many doctors as Florida does. Doctors who are being taken out of practice in Arizona because of incompetence are allowed to continue practicing in Florida with just slaps on the wrist. They're treated in a much more lax way.”⁵⁵ For instance, the Arizona Board of Medicine took 124 serious disciplinary actions against doctors last year which includes measures like license revocation, suspension, surrender or probation. That is an average of 10.52 serious actions per 1,000 doctors in the state. Florida, which has more than 44,000 licensed physicians, took serious action against an average of about three of every 1,000.⁵⁶

⁵² FLA STAT ANN. 458.331(1)(t) (2003). “Repeated malpractice” is defined by the statute to include: “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.”

⁵³ Florida Dept. of Health, Div. of Medical Quality Assurance, *Annual Report to the Florida Legislature*, Appendices, Table 9: Performance Statistics for Medical Malpractice Claims (2003), at *, available at <http://www.doh.state.fl.us/mqa/Publications/02-03appendices.pdf>.

⁵⁴ Public Citizen, News Release, “New 2002 Government Data Dispute Malpractice Lawsuit ‘Crisis’ in Florida” (July 8, 2003), available at http://www.citizen.org/documents/FL_NPDB.pdf.

⁵⁵ Kris Hundley, *Web site names punished doctors*, ST. PETERSBURG TIMES, Aug. 29, 2002, at 1E.

⁵⁶ *Id.*

The differences in doctor discipline are striking. Indeed, nearly half of Florida's disciplinary actions resulted in little more than a fine.⁵⁷ The Florida Department of Health's official records for the year ending June 30, 2002, report that the Department initiated 107 investigations against doctors who had three or more closed malpractice claims in the prior year, but only three of those doctors were disciplined.⁵⁸

The Department of Health conducted a comprehensive review of the healthcare disciplinary process because "there was concern expressed about the regulatory controls over practitioners who had malpractice judgments filed against them but who were not disciplined by their respective licensing boards."⁵⁹ The Workgroup Report concluded that the healthcare practitioner process "must seek to aggressively eliminate bad practitioners from the profession. . . ."⁶⁰ But this so-called comprehensive look at the healthcare practitioner disciplinary system does not mention the "3 in 5" statutory requirement.⁶¹ Either the Workgroup was unaware of the statutory requirement, or it did not envision the healthcare practitioner disciplinary system to include revocations of or denials of applications for medical licenses for those who have committed repeated malpractice, despite the statutory mandate in Florida.⁶²

In sum, advocates argue that Florida doctors are disciplined at varying degrees. The law permits discipline against offending doctors, but the state, for whatever reason,

⁵⁷ *Id.*

⁵⁸ See Florida Dept. of Health, Div. of Medical Quality Assurance, *Annual Report to the Florida Legislature*, Appendices, Table 9: Performance Statistics for Medical Malpractice Claims (2003), available at <http://www.doh.state.fl.us/mqa/Publications/02-03appendices.pdf>. These figures can be found in Table 9 as "3 in 5 Initiated" and "3 in 5 Disciplines." *Id.* The report does not indicate if any of the three disciplined physicians had their licenses revoked.

⁵⁹ Florida Dept. of Health, Executive Summary, *Healthcare Practitioner Disciplinary Workgroup Final Report* (Jan. 2004), at 3, available at http://www.doh.state.fl.us/mqa/Publications/rpt_discipline.pdf.

⁶⁰ *Id.* at 4.

⁶¹ FLA STAT ANN. 458.331(1)(t) (2003)

⁶² *Id.*

does not always pursue action. Amendment 8 will supplement the current law, requiring the Department of Health to deny or revoke licenses upon the “third strike” of malpractice finding, in addition to the existing discretionary authority that the Department carries.⁶³ In their initial brief before the Florida Supreme Court, Floridians for Patient Protection argues that Amendment 8 “will force the Department [of Health] to take the ‘3 in 5’ mandate seriously.”⁶⁴ The amendment lessons the Department of Health’s discretion in granting licenses and forces it to consider final findings of courts, administrative agencies and binding arbitration.

C. *Possible Reduction in Malpractice Insurance Premiums*

Improving patient safety is not the only justification offered for Amendment 8. Amendment 8 may also improve malpractice insurance premiums by rooting out “the bad” and leaving only “the good” for insurance companies to cover. It is for this very reason some scholars argue that doctors would be more successful at controlling their premiums if they concentrated on improving the quality of care provided, rather than demanding a cap on damages and other tort reforms.⁶⁵

In the mid-1980s, in the midst of skyrocketing malpractice premiums, anesthesiologists decided to adopt new practice guidelines aimed at significantly reducing the rate of patient deaths. They were very successful because today the average anesthesiologists’ insurance rates are “about the same as in 1985 and much lower than for most specialties.”⁶⁶ But Floridian doctors have not taken it upon themselves to self-

⁶³ Initial Brief of Sponsor, Floridians of Patient Protection, *In re Advisory Op. to Att’y Gen. re Public Protection from Repeated Malpractice*, 880 So.2d 667 (Fla. 2004).

⁶⁴ *Id.*

⁶⁵ Stephen C. Schoenbaum & Randall R. Bovbjerg, *Malpractice Reform Must Include Steps to Prevent Medical Injury*, 140 ANNALS INTERNAL MED. 51, 51 (2004).

⁶⁶ *Id.*

regulate as anesthesiologists did in the mid-1980s, possibly requiring more drastic action in the form of Amendment 8. That is why, at least in part, the amendment's proponents believe it will have the same positive impact on medical malpractice insurance rates that anesthesiologist practice guidelines had in the mid-1980s.

IV. CONSTITUTIONAL ROADBLOCKS

No matter what policy arguments may support the amendment, though, the supporters must first overcome significant constitutional and legal roadblocks standing in the way of full enactment. Initially, the amendment was to take effect the date it was approved by voters.⁶⁷ But the Florida Hospital Association (FHA), a trade association representing over 200 hospitals and health systems in Florida,⁶⁸ was joined by twenty other plaintiffs made up of hospitals and health care organizations and moved for declaratory and injunctive relief to prevent enactment.⁶⁹

The FHA challenged that the amendment was not “self-executing” and required legislative implementation.⁷⁰ The test to decide whether a Florida constitutional amendment is self-executing is whether it “lays down 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.”⁷¹ This rule from the Florida Supreme Court was most recently applied in 1997 in an advisory opinion to “Amendment 5,” an amendment that provided “those in the Everglades Agricultural Area

⁶⁷ Drew Douglas, *Judge Enjoins Implementation of Amendment Barring Licensure of ‘Three Strike’ Physicians*, 13 BNA HEALTH LAW REP. 46 (Nov. 18, 2004).

⁶⁸ About FHA, at <http://www.fha.org/about.html> (last visited March 9, 2005).

⁶⁹ Plaintiffs’ Joint Motion for Partial Summary Judgment and for Temporary Injunction, *Florida Hosp. Ass’n, Inc. v. Agency for Health Care Admin.*, No. 2004 CA 002483, (Fla. Cir. Ct., 2004).

⁷⁰ *Id.* See also 1996 Amendment 5 (Everglades) 706 So.2d 278 (Fla. 1997), where the Florida Supreme Court ruled that when an amendment is not self-executing, legislative action is a prerequisite to implementing the amendment.

⁷¹ *Gray v. Bryant*, 125 So.2d 846, 851 (Fla. 1960).

who caused water pollution within the Everglades Protection Area shall be primarily responsible for paying the costs of the abatement of that pollution.”⁷² The court determined that a constitutional provision is not self-executing if it fails to lay down a sufficient rule for accomplishing its purpose, or if the constitutional provision leaves,

“too many policy determinations unanswered . . . [such as the various] rights and responsibilities . . . and the means by which the purposes may be accomplished. Amendment 5 raises a number of questions such as what constitutes ‘water pollution’; how will one be adjudged a polluter; how will the cost of pollution abatement be assessed; and by whom might such a claim be asserted.”⁷³

When voters approved Amendment 5, “the voters expected the legislature to enact supplementary legislation to make it effective, to carry out its intended purposes, and to define any rights intended to be determined, enjoyed, or protected.”⁷⁴ Applying the reasoning and tests laid down by the Florida Supreme Court to Amendment 8 leads to the conclusion that it is not self-executing and requires legislative implementation. The unanswered policy determinations, and unknown rights and responsibilities, are discussed below. These questions must be satisfactorily resolved by the legislature before enactment.

A. Scope of Amendment Eight

FHA’s complaint charged that Amendment 8 failed to define the scope of its applicability, noting a reference to “medical doctors” was much too broad of a term, and

⁷² Advisory Opinion to the Governor – 1996 Amendment 5 (Everglades), 706 So.2d 278, 281 (Fla. 1997).

⁷³ *Id.* Although advisory opinions are not binding judicial precedents, “they are frequently very persuasive and usually adhered to.” *Barley v. South Florida Water Mgmt. Dist.*, 823 So.2d 73, 82 (Fla. 2002).

⁷⁴ 706 So.2d at 282 (Fla. 1997).

not defined in the amendment itself or in Florida statutes.⁷⁵ The Florida Dental Association⁷⁶ was apparently even concerned that its members could be subject to Amendment 8, because that Association filed a brief opposing the amendment in the Florida Supreme Court advisory opinion proceedings.⁷⁷ Their filing demonstrates the significant uncertainties Amendment 8 creates.

The term “medical doctors” could mean “physicians” licensed under Chapter 458 of Florida law.⁷⁸ Alternatively, it could include dentists licensed under Chapter 466.⁷⁹ Under current law, discounting Amendment 8, dentists can be liable for “medical malpractice” for purposes of presuit requirements.⁸⁰ However, dentists are not subject to discipline by the Board of Medicine. Instead, they are subject to the Board of Dentistry.⁸¹ If Amendment 8 merely strengthens the Department of Health, as the FPP alleges,⁸² then that would suggest dentists are immune to the amendment provisions. Further, Florida statutes indicate there is a distinction between a “medical doctor” and a “dentist,”⁸³ and at least one court has defined “medical doctors” as those licensed under Chapter 458.⁸⁴

⁷⁵ Drew Douglas, *Judge Enjoins Implementation of Amendment Barring Licensure of ‘Three Strike’ Physicians*, 13 BNA HEALTH LAW REP. 46 (Nov. 18, 2004).

⁷⁶ The Florida Dental Association is a professional organization of over 7,000 dentists in Florida. Over 80 percent of all Florida dentists are members. FDA: Public: Who We Are, at <http://www.floridadental.org/public/who>.

⁷⁷ *In re Advisory Op. to Att’y Gen. re Public Protection from Repeated Medical Malpractice*, 880 So.2d 667 (Fla. 2004).

⁷⁸ FLA. STAT. ANN. § 458.305 (2005).

⁷⁹ FLA. STAT. ANN. § 466.003 (2005).

⁸⁰ *Hord v. Taibi*, 801 So.2d 1011 (Fla. 4th DCA 2001).

⁸¹ Fla. Stat. § 466.004 (2003).

⁸² Initial Brief of Sponsor, Floridians of Patient Protection, *In re Advisory Op. to Att’y Gen. re Public Protection from Repeated Malpractice*, 880 So.2d 667 (Fla. 2004).

⁸³ *See, e.g.*, FLA. STAT. § 61.403(2) (2003); FLA. STAT. § 455.241 (2003).

⁸⁴ *Robinson v. Shands Teaching Hospital*, 625 So.2d 21, 28 (Fla. 1st DCA 1993).

However, one of the other Amendments proposed by Floridians for Patient Protection is expressly limited to physicians licensed under Chapter 458.⁸⁵ FPP could have been similarly clear with Amendment 8, but chose not to be. Voters approving an amendment are presumed to have normal intelligence and common sense, but not legal expertise.⁸⁶ The precise meaning of “medical doctor” requires special knowledge, or a legal definition of the term. In their Answer Brief before the Florida Supreme Court, FPP also suggests dentists will be immune because “the term ‘medical doctor’ together with ‘licensed to practice medicine’ prevents voters from mistakenly supposing that the proposed Public Protection amendment will apply to other professionals such as dentists, osteopaths or chiropractors.”⁸⁷ But because the amendment itself offers no clues to the definition of “medical doctor,” the amendment’s scope is ripe for judicial interpretation to include dentists. The line determining Amendment 8’s scope is unclear, and requires legislative clarity before the amendment can be implemented.

B. Defining “Medical Malpractice”

Related to this issue is the standard of care that will apply, and how the differing terms for “medical malpractice” will affect judgments against physicians. The amendment offers a special definition of “medical malpractice” as:

“[B]oth 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

⁸⁵ See In re Advisory Op. to Att’y Gen. re Physician Shall Charge the Same Fee for the Same Health Care Service to Every Patient, 880 So.2d 659 (Fla. 2004).

⁸⁶ Advisory Opinion to the Attorney General re Tax Limitation, 673 So. 2d 864, 868 (Fla. 1996) (*Tax Limitation II*) (voters, by learning and experience, would understand the general rule that a simple majority prevails); See also Advisory Opinion to the Attorney General, re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So. 2d 888, 899 (Fla. 2000).

⁸⁷ Answer Brief of Sponsor, Floridians of Patient Protection, In re Advisory Op. to Att’y Gen. re Public Protection from Repeated Malpractice, 880 So.2d 667 (Fla. 2004).

and any similar wrongful act, neglect, or default in other states or countries which, if committed in Florida, would have been considered medical malpractice.”⁸⁸

But this constitutes a very different standard than “medical malpractice” as it is traditionally applied in Florida, where medical malpractice is a breach of “that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.”⁸⁹ Amendment 8 appears to minimize or altogether do away with considerations from “surrounding circumstances” and “reasonably similar health care providers.” This language is noticeably missing from the amendment’s definition.

Amendment 8 also imposes a statewide Florida standard of care on non-Florida acts. This drastically changes the community-based standards currently used in medical malpractice cases.⁹⁰ The result will have devastating effects on rural physicians and hospitals that cannot always provide or afford the same level of care as more affluent metropolitan providers. Often metropolitan and suburban health care providers can afford more advanced equipment and thereby provide a higher standard of care.⁹¹

Amendment 8 removes consideration of these factors and forces physicians, no matter the surrounding circumstances, to provide the same standard of care.

C. Rights Under Amendment Eight – Prospective Application

⁸⁸ Florida Department of State, Division of Elections, *at* <http://election.dos.state.fl.us/initiatives/fulltext/35169-8.htm> (last visited November 20, 2004).

⁸⁹ FLA. STAT. § 766.102(1) (2003).

⁹⁰ *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”).

⁹¹ *See* Dianne Miller Wolman & Wilhelmine Miller, *The Consequences of Uninsurance for Individuals, Families, Communities, and the Nation*, 32 J.L. MED. & ETHICS 397 (2004).

Even after “medical malpractice” and “medical doctors” are defined, though, there is no clear way to discern the rights and duties of those falling within that scope, or who makes those determinations. For example, it is not clear whether Amendment 8 applies retroactively to include past adjudications that occurred before the amendment was approved. Similarly, it is not clear whether a judgment or decision must be issued after the effective date of the Amendment, or whether the actual incident of medical malpractice must occur after the effective date of the Amendment.

If Amendment 8’s sponsors are any indication, the amendment will apply retroactively. In their Answer Brief before the Supreme Court, Floridians for Patient Protection predict that “there will be no effect of the proposed amendment on 98 percent of all physicians in Florida. Only two percent of physicians in Florida have three or more malpractice claims against them.”⁹² The implication is that physicians who already have three or more malpractice claims against them will fall under the amendment’s disciplinary provisions.

However it is unlikely that Florida courts will include adjudications prior to the Amendment’s approval, or even decisions issued after the effective date but whose incidents occurred before. Florida courts consistently apply the traditional tenet of statutory construction that a law applies prospectively absent clear legislative intent to the contrary.⁹³ Retroactive application of a law is generally disfavored.⁹⁴ This rule of

⁹² Answer Brief of Sponsor, Floridians of Patient Protection, In re Advisory Op. to Att’y Gen. re Public Protection from Repeated Malpractice, 880 So.2d 667 (Fla. 2004) (citing Public Citizen, News Release, *New 2002 Government Data Dispute Malpractice Lawsuit ‘Crisis’ in Florida* (July 8, 2003), available at: <http://www.citizen.org/congress/civjus/medmal/articles.cfm?ID=8282>).

⁹³ See, e.g., *Metropolitan Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999); *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995).

⁹⁴ *Bates v. State*, 750 So. 2d 6, 10 (Fla. 1999) (“Retroactive application of the law is generally disfavored . . . and any basis for retroactive application must be unequivocal and leave no doubt as to the legislative intent.”).

statutory construction favoring prospective operation applies to constitutional amendments as well. The Florida Supreme Court has ruled, consistently, that “[u]nless specifically stated in the text or in the statement placed on the ballot, constitutional amendments are generally given prospective effect only.”⁹⁵ This rule “applies with particular force to those instances where retrospective operation of the law would impair or destroy existing rights.”⁹⁶

Amendment 8 does not express any intent to apply retroactively. In fact, the amendment expresses the exact opposite in setting the effective date as “the date it is approved by the electorate.”⁹⁷ This neither expresses nor implies retroactive application. In constitutional amendments with similar wording the Florida Supreme Court has refused to apply them retroactively⁹⁸ and the Court should likewise apply Amendment 8 prospectively. Moreover, because the law would “impair or destroy existing rights” of physicians who already have three medical malpractice judgments against them, the Court’s traditional rule of applying amendment’s prospectively should carry “particular force.”⁹⁹ Nevertheless, the language of the Amendment leaves room for potential judicial interpretation and lawmaking.

⁹⁵ In re Advisory Opinion to the Governor—Terms of County Court Judges, 750 So. 2d 610, 614 (Fla. 1999), citing *State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983) (“Nowhere in either article I, section 12 as amended or in the statement placed on the November ballot is there manifested any intent that the amendment be applied retroactively. Therefore, the amendment must be given prospective effect only.”). See also *State ex rel. Judicial Qualifications Comm’n v. Rose*, 286 So. 2d 562 (Fla. 1973); *Bogle v. Perkins*, 240 So. 2d 801 (Fla. 1970).

⁹⁶ *State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983). “When faced with constitutional amendments not clearly expressing an intent to the contrary, this Court [Supreme Court of Florida] has repeatedly refused to construe the amendment to affect detrimentally the substantive rights of persons arising under the prior law.” *Id.* at 324.

⁹⁷ Florida Department of State, Division of Elections, *available at* <http://election.dos.state.fl.us/initiatives/fulltext/35169-8.htm> (last visited November 20, 2004).

⁹⁸ See, e.g., *Bates*, 750 So. 2d at 10 (“This act shall take effect upon becoming law.”); *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 109 (Fla. 1996) (“Except as otherwise provided herein, this act shall take effect October 1, 1992.”).

⁹⁹ *State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983).

D. Standards for Revocation

The legal uncertainties surrounding the Amendment seemingly have no end. Adverse judgments in other jurisdictions, or those involving standards of care different from the standards applied in Florida, may be “converted” administratively or judicially to carry weight under Amendment 8’s provisions, but the express language of the Amendment does not reveal whether or how this would take place. This too leaves significant room for judicial interpretation and lawmaking.

In Florida, adverse medical malpractice judgments are obtained under a “preponderance of evidence” standard,¹⁰⁰ but Florida law requires that license revocations meet a “clear and convincing evidence” standard.¹⁰¹ In essence, then, a civil judgment’s standard will be overriding the license revocation standard. Floridians for Patient Protection respond that “[c]hanging the standard of proof is neither the purpose nor even a major likely effect of the proposed amendment.”¹⁰² But as the FHA argued in its complaint, “There would have to be some method of ‘converting’ medical malpractice judgments, which are determined under a civil preponderance of the evidence standard, into ‘findings’ of wrongdoing sufficient to meet the Florida standard of clear and convincing evidence required for license revocation.”¹⁰³

The Florida Supreme Court has already ruled, as a matter of right, that physicians and other professionals are entitled to due process protection under the clear and

¹⁰⁰ See *Gooding v. University Hosp. Bldg., Inc.*, 445 So.2d 1015 (Fla. 1984) (reaffirming the traditional preponderance of evidence standard and rejecting the so-called “lost chance of survival” rule in medical negligence cases).

¹⁰¹ See FLA. STAT. ANN. 458.331(1)(t) (2003).

¹⁰² Answer Brief of Sponsor, Floridians of Patient Protection, *In re Advisory Op. to Att’y Gen. re Public Protection from Repeated Malpractice*, 880 So.2d 667 (Fla. 2004).

¹⁰³ Plaintiffs’ Joint Motion for Partial Summary Judgment and for Temporary Injunction, *Florida Hosp. Ass’n, Inc. v. Agency for Health Care Admin.*, No. 2004 CA 002483, (Fla. Cir. Ct., 2004).

convincing standard of proof when facing license revocation.¹⁰⁴ Similarly, physicians cannot lose the licenses except for “substantial” reasons.¹⁰⁵ Amendment 8 removes these due process protections and significantly alters the standard of proof and the degree of offense necessary to revoke a license. In sum, Amendment 8 shortchanges physicians an important due process right.

E. Enforcement Questions

Amendment 8 also leaves enforcement of its provisions unknown or undefined. May a citizen bring a private action to enforce the Amendment, or will courts be obligated to judicially invalidate licenses when they are advised that the action involves a third finding of medical malpractice? Amendment 8 states, “No person who has been found to have committed three or more incidents of medical malpractice shall . . . continue to be licensed”¹⁰⁶ This offers no clues to the amendment’s enforcement.

In their Initial Brief before the Florida Supreme Court, Floridians for Patient Protection explains:

“This ‘three strikes’ initiative simply requires the Department of Health to do something in addition to current law (withhold or revoke license). . . . The proposed amendment supplements current law, in large part by removing the discretion of the Department of Health to ignore the final findings of malpractice by courts, administrative agencies and binding arbitration.”

Although FPP’s brief is non-binding and carries no statutory weight, it does offer insight into the intent of the amendment’s sponsors. The phrase “requires the Department

¹⁰⁴ Ferris v. Turlington, 510 So.2d 292, 294-295 (Fla. 1987) (requiring clear and convincing evidence for any penal sanction).

¹⁰⁵ *Id.* at 292.

¹⁰⁶ Florida Department of State, Division of Elections, *available at* <http://election.dos.state.fl.us/initiatives/fulltext/35169-8.htm> (last visited November 20, 2004).

of Health to do something” and noting that the amendment supplements current law by “removing the discretion of the Department of Health” suggests that the DOH may not wait for private individuals to bring action against a physician under Amendment 8. Instead, according to the implied language of the FPP, the DOH must be proactive in enforcing Amendment 8 against doctors. It is possible that judicial interpretation of Amendment 8 might require the DOH to take emergency action if a doctor commits a third incident of medical malpractice. Existing Florida law requires a showing of an immediate danger to public health, safety, and welfare.¹⁰⁷ As with many portions of Amendment 8, the text itself offers no clues, and judicial interpretation or further statutory enhancement will be necessary.

F. Current Status of the Amendment

The FHA’s efforts to prevent the amendment’s implementation were successful, at least temporarily. In a bench ruling, Judge Janet E. Ferris of the Florida Circuit Court, 2nd Judicial Circuit, Leon County, issued a temporary injunction prohibiting Amendment 8 from taking effect.¹⁰⁸

The injunction will last until the end of the 2005 regular legislative session.¹⁰⁹ Bill Bell, general counsel to the Florida Hospital Association, said the court’s ruling would grant lawmakers time to implement the amendment.¹¹⁰ In a telephone interview, Bell added that it was “likely the issues surrounding implementation of Amendment 8

¹⁰⁷ FLA. STAT. § 120.60(8) and 120.54(9) (1985).

¹⁰⁸ Florida Hosp. Ass’n, Inc. v. Agency for Health Care Admin., No. 2004 CA 002483, (Fla. Cir. Ct., 2004).

¹⁰⁹ Drew Douglas, *Judge Enjoins Implementation of Amendment Barring Licensure of ‘Three Strike’ Physicians*, 13 BNA HEALTH LAW REP. 46 (Nov. 18, 2004).

¹¹⁰ Drew Douglas, *Judge Enjoins Implementation of Amendment Barring Licensure of ‘Three Strike’ Physicians*, 13 BNA HEALTH LAW REP. 46 (Nov. 18, 2004).

would require a final determination by the Florida Supreme Court.”¹¹¹ Florida’s Supreme Court has not yet decided to hear the issue.

V. THREE STRIKE AMENDMENT POLICY DISADVANTAGES

A. *Medical Malpractice Suits Will Rise and Doctors Will Be Forced to Unnecessarily Settle*

Beyond the web of legal thorns that plague Amendment 8, policy disadvantages loom in the background. Doctors and others rightly worry that it will actually increase litigation, and hence malpractice insurance premiums, not lessen them. Lester Brickman, a professor at the Benjamin N. Cardozo School of Law at Yeshiva University, warns, “It will be a big cottage industry. There will be a lot of lawsuits. Over the next ten years, virtually every doctor in Florida can expect to be sued because of this.”¹¹² Jay Wolfson, an attorney and director of the University of South Florida’s Suncoast Center for Patient Safety Research in Tampa, adds, “There may be a boutique practice of law set up to go after the low end of settlement cases. If physicians thought there were frivolous malpractice lawsuits going on in the past, you may not have seen anything yet.”¹¹³

The amendment’s opponents raise these doomsday predictions based on the belief that doctors will be forced to settle after having been found guilty of malpractice twice, fearing that a third malpractice judgment could force them to lose their license altogether. Unlike current Florida law, which takes into account both settled and litigated claims in determining disciplinary action,¹¹⁴ Amendment 8 counts only judgments and not settlements. After a doctor receives one or two adjudications against him, the dangers of

¹¹¹ *Id.*

¹¹² Siobhan Morrissey, *Doctors Fear Three-Strikes Law*, ABA JOURNAL EREPORT, Nov. 12, 2004, at <http://www.abanet.org/journal/ereport/nov12strikes.html> (last visited March 8, 2005).

¹¹³ *Id.* (quoting Jay Wolfson, an attorney and director of the University of South Florida’s Suncoast Center for Patient Safety Research in Tampa).

¹¹⁴ See FLA. STAT. § 458.331(1)(t) (2003).

taking another suit to trial are too great, even if the chances of the suit prevailing are small. The incentive to settle will loom large for doctors, and it is likely that employers or insurance carriers would force the doctors to settle as well out of fear that the suit would lose, causing them to lose an employee or customer. As Tallahassee attorney Jerome Hoffman put it, doctors will look at Amendment 8 and say, “I don’t care how much it costs to settle this case, but settle it, because I don’t want to put my license at risk.”¹¹⁵

Floridians for Patient Protection respond to the charges by arguing that the history of medical malpractice litigation does not threaten to increase pressure to settle.¹¹⁶ “In fact, the vast majority of malpractice claims in the United States are unsuccessful.”¹¹⁷ In essence, FPP believes that the unsuccessful result of most malpractice suits means physicians will be just as confident in challenging suits at trial. But considering only a suit’s chance of success is a logical fallacy that fails to consider the increased impact such judgments carry. Considering both the chance of success and the significance of a judgment, physicians will in fact be more likely to settle, sometimes with cases that they might ordinarily contest.

Florida's Division of Administrative Hearings (DOAH) agrees, explaining there “may be an increase in the number of requests for administrative hearings from doctors

¹¹⁵ Morrissey, *supra* note 130.

¹¹⁶ Answer Brief of Sponsor, Floridians of Patient Protection, In re Advisory Op. to Att’y Gen. re Public Protection from Repeated Malpractice, 880 So.2d 667 (Fla. 2004).

¹¹⁷ Answer Brief of Sponsor, Floridians of Patient Protection, In re Advisory Op. to Att’y Gen. re Public Protection from Repeated Malpractice, 880 So.2d 667 (Fla. 2004) (citing Thomas H. Cohen & Steven K. Smith, *Civil Trial Cases and Verdicts In Large Counties*, 2001 (U.S. Dept. of Justice, Bureau of Justice Statistics Bulletin No. NCJ 202803, April 2004), at 1, *available at*: <http://www.ojp.usdoj.gov/bjs/pub/pdf/ctevlc01.pdf> (noting that plaintiffs prevailed in only 27% of medical malpractice trials)).

who fear blemishes on their records.”¹¹⁸ One Florida hospital agrees, warning, “This amendment will result in an increase in malpractice suits and settlements. Plaintiff’s personal injury lawyers will know that, because physician licenses are at stake, the physicians cannot and will not take the risk of losing in court and will settle, no matter how frivolous the claim.”¹¹⁹ Further, because preliminary decisions of the Board of Medicine carry even more weight under Amendment 8, there will be an increase in the number of challenges to those decisions.¹²⁰

Even the Academy of Florida Trial Lawyers, who backed the amendment, admits that increased litigation is a real possibility. Alexander Clem, academy president, conceded, “Presumably, it could have that effect. But it was never designed by the Academy of Florida Trial Lawyers to have the effect of forcing settlements on doctors so they would avoid a strike or potential strike at trial.”¹²¹ Mr. Clem, whose organization’s members would benefit from increased litigation, may be honest in stating increased litigation was not the Academy’s intention, but that appears to be the consequence nevertheless.

The impact on the judicial system may in fact be minimal, but when arbitration costs are factored in, the negative impact on physicians will likely be even higher.

According to DOAH, “there may be an increase in the number of claimants agreeing to

¹¹⁸ Initiative Financial Information Statement, Public Protection from Repeated Medical Malpractice, available at http://www.state.fl.us/edr/conferences/constitutionalimpact/a4fis_complete.pdf.

¹¹⁹ Florida Hospital, *Constitutional Amendments 3, 7, & 8*, HEALTH ISSUE BRIEFS, October 2004. “Florida Hospital” is a seven-campus hospital system owned and operated by Adventist Health System, which is a plaintiff in the suit seeking a permanent injunction for the amendment. It is one of the largest hospital systems in the country, ranking first in the country for number of inpatient admissions by the American Hospital Association. See Florida Hospital Press Room & Medical News, at <http://www.floridahospitalmedicalnews.com/news-Florida-Hospital-System-cat26.html>.

¹²⁰ Initiative Financial Information Statement, Public Protection from Repeated Medical Malpractice, available at http://www.state.fl.us/edr/conferences/constitutionalimpact/a4fis_complete.pdf.

¹²¹ Morrissey, *supra* note 130.

proceed through the binding arbitration process rather than face circuit court.”¹²² This, in turn, may increase administrative costs.

B. Decline in Access to Physicians and Care

This abnormal willingness to settle, sometimes with frivolous cases, will be ripe for exploitation. Plaintiffs and attorneys may very well target doctors who already have one or two judgments against with the aim of forcing the doctor to settle. Florida Representative Ed Homan, who is also an orthopedic surgeon, warns, “Doctors will leave the state after two cases, not three. It’s two strikes and you’re out in Florida.”¹²³ The result is a desire to settle, even with weak claims, because of the chance, even if remote, of losing a medical license. For those doctors who have taken cases to trial and who have had one or more adverse judgments against them, the temptation to move to a more “doctor friendly” state will be hard to resist.

High-risk specialties such as obstetrics, neurosurgery and trauma care may be particularly affected. “Doctors in those areas won’t stick around to be repeatedly sued,” Representative Homan warns.¹²⁴ The Agency for Health Care Administration (AHCA), believes the amendment could result in fewer physicians, particularly specialists, available in the marketplace.¹²⁵ With fewer physicians comes the unintended effect of reduced services to Medicaid clients as physicians seek to avoid high risk services or high risk patients.¹²⁶ If fewer physicians are able to practice, Amendment 8 “could also have a negative impact on HMOs and other health plans’ ability to find physicians for their

¹²² Initiative Financial Information Statement, Public Protection from Repeated Medical Malpractice, *available at* http://www.state.fl.us/edr/conferences/constitutionalimpact/a4fis_complete.pdf.

¹²³ Morrissey, *supra* note 130.

¹²⁴ Morrissey, *supra* note 130.

¹²⁵ Initiative Financial Information Statement, Public Protection from Repeated Medical Malpractice, *available at* http://www.state.fl.us/edr/conferences/constitutionalimpact/a4fis_complete.pdf.

¹²⁶ *Id.*

networks.”¹²⁷ Medicaid HMO consumers would then be transferred back to fee-for-service in areas where there are significant shortages of physicians. The net result is an increase in costs, although Florida’s Financial Impact Estimating Conference was unable to determine the exact fiscal impact.¹²⁸

C. *Medical Malpractice Is Not a Crisis in Florida*

In addition to the negative practical impact on Florida doctors, and the potential constitutional issues surrounding the amendment, Amendment 8 may simply be an attempt to fix a problem that does not exist. Physicians who commit 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.”¹²⁹ This intent was carried out through a regulatory scheme under which the Florida Board of Medicine, a part of the Florida Department of Health, regulates licensure and disciplines health care providers.¹³⁰ Among those criteria for refusal to license, or to revoke an existing license, is “gross or repeated malpractice.”¹³¹

A report in April 2002 by the Federation of State Medical Boards ranked Florida first among large states in the percentage of physicians disciplined.¹³² This stands in stark contrast to the picture painted by the Public Citizen's Health Research Group, discussed *supra* in section IV. A., which suggests Florida does little to discipline doctors committing malpractice. Floridians for Patient Protection suggest that most (alleged)

¹²⁷ *Id.*

¹²⁸ *Id.* The determination was “based on independent research; oral and written statements from the proponents, opponents, and state departments and agencies; and discussions among the Estimating Conference principals and their professional staff.” *Id.*

¹²⁹ FLA. ANN. STAT. § 458.301 (2003).

¹³⁰ *See* FLA. ANN. STAT. § 458.331 (2003); *Id.* § 456.072(2)(b).

¹³¹ FLA. ANN. STAT. § 458.331(t) (2003).

¹³² Kris Hundley, *Web site names punished doctors*, ST. PETERSBURG TIMES, Aug. 29, 2002, at 1E.

malpractice is committed by a small minority of physicians.¹³³ Of the physicians that settled three or more cases, the FPP complains, only 13.8 percent have been disciplined.¹³⁴ But this suggests fault or wrongdoing in settling cases, and this is an erroneous inference considering a physician's insurance company has the ultimate decision-making power to settle claims. Moreover, numerous factors must be considered in settlements such as the riskiness, the judicial climate of where the doctor practices, and the tendency of a doctor's insurance company to settle.

The Floridians for Patient Protection and those who support their initiative, such as Public Citizen, rarely, if ever, offered actual evidence of a doctor posing as a threat to the public who had not been disciplined. Amendment 8's advocates instead rest most of the argument on an inference that physicians who have been sued three or more times must, by default, be dangerous. Such a tenuous connection seems too weak to justify a constitutional amendment. Perhaps just as important, the various statistics offered by FPP does not actually relate to the Amendment. The numerous references to settlements in support of the initiative are irrelevant because only "findings of malpractice" are counted. And here, once again, FPP was unable to offer a single example of a doctor who had three such "findings" who was not substantially disciplined or lost their license to practice.¹³⁵ In sum, discussions about physician settlements are misleading and lose

¹³³ See discussion *supra* at section IV. A.

¹³⁴ Initial Brief of Sponsor, Floridians of Patient Protection, In re Advisory Op. to Att'y Gen. re Public Protection from Repeated Malpractice, 880 So.2d 667 (Fla. 2004) (*citing* Public Citizen, News Release, "New 2002 Government Data Dispute Malpractice Lawsuit 'Crisis' in Florida" (July 8, 2003), *available at* http://www.citizen.org/documents/FL_NPDB.pdf).

¹³⁵ In re Advisory Op. to Att'y Gen. re Public Protection from Repeated Medical Malpractice, 880 So.2d 667 (Fla. 2004). *See also* Initiative Financial Information Statement, Public Protection from Repeated Medical Malpractice, *available at* http://www.state.fl.us/edr/conferences/constitutionalimpact/a4fis_complete.pdf ("Currently, Florida does not have any physicians who have 3 or more court verdicts or a combination of discipline and court

sight of the more important statistics concerning successful “findings” against doctors. With the proper perspective on important statistics, we find that Florida doctors are far from dangerous and do not warrant the harsh constitutional amendment proposed by FPP.

D. Increased Physician Fees and Costs

Florida law requires that the Financial Impact Estimating Conference “complete an analysis and financial impact statement to be placed on the ballot of the estimated increase or decrease in any revenue or costs to state or local governments resulting from the proposed initiative.”¹³⁶ The conference’s findings in its financial impact statement relating to Amendment 8¹³⁷ reveal economic concerns that must be considered.

Assuming the responsibility to determine confirmed malpractice incidents lies with the government, the costs associated with business activities required to review and research records for physicians will increase substantially. The Department of Health (DOH) “estimates recurring costs for initial applicants of \$311,523 for allopathic physicians. Nonrecurring costs for existing licensees are estimated at \$292,830 for allopathic physicians.”¹³⁸ The Financial Impact Estimating Conference predicts the costs will be funded through increases to licensure fees because the cost of professional

verdicts; there are, however, 8 allopathic physicians who have 3 or more incidents that may require action, if applied retroactively.”).

¹³⁶ FLA STAT ANN. § 100.371. The Financial Impact Estimating Conference is a division of the Office of Economic and Demographic Research, which is a research arm of the Legislature “principally concerned with forecasting economic and social trends that affect policy making, revenues, and appropriations.” EDR About Us Page, at <http://www.state.fl.us/edr/aboutus.htm>.

¹³⁷ Initiative Financial Information Statement, Public Protection from Repeated Medical Malpractice, available at http://www.state.fl.us/edr/conferences/constitutionalimpact/a4fis_complete.pdf. “[T]he Financial Impact Estimating Conference principals . . . heard testimony on the fiscal effects of this amendment from representatives of Floridians for Patient Protection (FPP) and the Florida Medical Association (FMA). Additionally, a questionnaire was mailed . . . requesting input from various state agencies, local governmental entities, and other organizations regarding fiscal impacts and the development of cost estimates. Representatives of these entities were invited to [a] . . . meeting of the Financial Impact Estimating Conference to answer questions or provide additional information on potential costs.” *Id.*

¹³⁸ *Id.*

regulation is fee supported.¹³⁹ This suggested source of the cost is not found within the amendment or in any pending legislation, but if the conference's suggestion is in fact true, the amendment will in essence act as a tax on Florida physicians - first through increased fees and then through indirect costs of the amendment's negative impacts.

CONCLUSION

Speaking strictly from a policy perspective, Amendment 8 brings disastrous consequences that include a greater number of malpractice suits and higher, unnecessary settlements. There will also be a decline in access to physicians and care, as well increased physician fees and costs. And all of these disadvantages may need to be stomached in order to solve a malpractice problem that does not even exist.

The policy disadvantages are compounded by the web of legal and constitutional thorns accompanying Amendment 8. The amendment's scope is vague and has the potential to reach doctors such as dentists. The standard of care to qualify as malpractice broadens, the standard for license revocation weakens, and the enforcement of Amendment 8 remains unresolved.

There is undoubtedly some legitimate justification for the amendment's passage, such as perceived state inaction toward negligent physicians in Florida. Moreover, it has the potential to actually decrease malpractice insurance. But in the final analysis Amendment 8 will likely have the opposite effect as doctors are sued more often and forced to accept higher settlements. Florida's "three strikes" law is the first of its kind, and if voters are wise, it will be the last.

¹³⁹ *Id.*