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1 A bill to be entitled
2 An act relating to medical negligence actions;
3 amending s. 456.057, F.S.; authorizing a health care
4 practitioner or provider who reasonably expects to be
5 deposed, to be called as a witness, or to receive
6 discovery requests to consult with an attorney on
7 certain matters; authorizing the disclosure of patient
8 information in connection with litigation under
9 certain circumstances; prohibiting a medical liability
10 insurer from selecting an attorney for a health care
11 practitioner or provider or recommending that a
12 practitioner or provider seek legal counsel on a
13 particular matter; authorizing a medical liability
14 insurer to recommend an attorney to a health care
15 practitioner or provider under certain circumstances;
16 restricting the health care practitioner's or
17 provider's attorney from disclosing information to the
18 medical liability insurer under certain circumstances;
19 authorizing the health care practitioner's or
20 provider's attorney to represent the insurer or other
21 insureds of the insurer in unrelated matters;
22 specifying exceptions to the limitations on
23 disclosures by the attorney to the insurer of the
24 practitioner or provider; amending s. 766.102, F.S.;
25 revising qualifications to give expert testimony on
26 the prevailing professional standard of care; deleting
27 provision regarding limitations of section; amending
28 s. 766.106, F.S.; providing that a prospective
29 defendant may conduct an interview with a claimant's

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30 treating health care provider as a tool of informal
31 discovery; amending s. 766.1065, F.S.; revising the
32 form for the authorization of release of protected
33 health information; providing for the release of
34 protected health information to certain treating
35 health care providers, insurers, and attorneys;
36 authorizing a treating health care provider, insurer,
37 or attorney to use protected health information in
38 connection with legal services relating to a medical
39 negligence claim; authorizing certain individuals and
40 entities to conduct interviews with the claimant's
41 health care providers; amending s. 381.028, F.S.;
42 conforming a cross-reference to changes made by the
43 act; providing for application of the act to certain
44 causes of action; providing an effective date.

45
46 Be It Enacted by the Legislature of the State of Florida:

47
48 Section 1. Subsections (7) and (8) of section 456.057,
49 Florida Statutes, are amended, and present subsections (9)
50 through (21) of that section are renumbered as subsections (8)
51 through (20), respectively, to read:

52 456.057 Ownership and control of patient records; report or
53 copies of records to be furnished; disclosure of information.-

54 (7) (a) Except as otherwise provided in this section and in
55 s. 440.13(4)(c), such records may not be furnished to, and the
56 medical condition of a patient may not be discussed with, any
57 person other than the patient, or ~~or~~ the patient's legal
58 representative, or other health care practitioners and providers

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59 involved in the patient's care or treatment ~~of the patient,~~
60 except upon written authorization from ~~of~~ the patient. However,
61 such records may be furnished without written authorization
62 under the following circumstances:

63 1. To any person, firm, or corporation that has procured or
64 furnished such care ~~examination~~ or treatment with the patient's
65 consent.

66 2. When compulsory physical examination is made pursuant to
67 Rule 1.360, Florida Rules of Civil Procedure, in which case
68 copies of the medical records shall be furnished to both the
69 defendant and the plaintiff.

70 3. In any civil or criminal action, unless otherwise
71 prohibited by law, upon the issuance of a subpoena from a court
72 of competent jurisdiction and proper notice to the patient or
73 the patient's legal representative by the party seeking such
74 records.

75 4. For statistical and scientific research, provided the
76 information is abstracted in such a way as to protect the
77 identity of the patient or provided written permission is
78 received from the patient or the patient's legal representative.

79 5. To a regional poison control center for purposes of
80 treating a poison episode under evaluation, case management of
81 poison cases, or compliance with data collection and reporting
82 requirements of s. 395.1027 and the professional organization
83 that certifies poison control centers in accordance with federal
84 law.

85 (b) Absent a specific written release or authorization
86 permitting utilization of patient information for solicitation
87 or marketing the sale of goods or services, any use of that

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88 information for those purposes is prohibited.

89 ~~(c)(8) Except in a medical negligence action or~~
90 ~~administrative proceeding when a health care practitioner or~~
91 ~~provider is or reasonably expects to be named as a defendant,~~
92 Information disclosed to a health care practitioner by a patient
93 in the course of the care and treatment of such patient is
94 confidential and may be disclosed only to other health care
95 practitioners and providers involved in the care or treatment of
96 the patient, ~~or~~ if allowed ~~permitted~~ by written authorization
97 from the patient, or if compelled by subpoena at a deposition,
98 evidentiary hearing, or trial for which proper notice has been
99 given.

100 (d) Notwithstanding paragraphs (a)-(c), information
101 disclosed by a patient to a health care practitioner or provider
102 or records created by the practitioner or provider during the
103 course of care or treatment of the patient may be disclosed:

104 1. In a medical negligence action or administrative
105 proceeding if the health care practitioner or provider is or
106 reasonably expects to be named as a defendant;

107 2. Pursuant to s. 766.106(6)(b)5.;

108 3. As provided for in the authorization for release of
109 protected health information filed by the patient pursuant to s.
110 766.1065; or

111 4. To the health care practitioner's or provider's attorney
112 during a consultation if the health care practitioner or
113 provider reasonably expects to be deposed, to be called as a
114 witness, or to receive formal or informal discovery requests in
115 a medical negligence action, presuit investigation of medical
116 negligence, or administrative proceeding.

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117 a. If the medical liability insurer of a health care
118 practitioner or provider described in this subparagraph
119 represents a defendant or prospective defendant in a medical
120 negligence action:

121 (I) The insurer for the health care practitioner or
122 provider may not contact the health care practitioner or
123 provider to recommend that the health care practitioner or
124 provider seek legal counsel relating to a particular matter.

125 (II) The insurer may not select an attorney for the
126 practitioner or the provider. However, the insurer may recommend
127 attorneys who do not represent a defendant or prospective
128 defendant in the matter if the practitioner or provider contacts
129 an insurer relating to the practitioner's or provider's
130 potential involvement in the matter.

131 (III) The attorney selected by the practitioner or the
132 provider may not, directly or indirectly, disclose to the
133 insurer any information relating to the representation of the
134 practitioner or the provider other than the categories of work
135 performed or the amount of time applicable to each category for
136 billing or reimbursement purposes. The attorney selected by the
137 practitioner or the provider may represent the insurer or other
138 insureds of the insurer in an unrelated matter.

139 b. The limitations in this subparagraph do not apply if the
140 attorney reasonably expects the practitioner or provider to be
141 named as a defendant and the practitioner or provider agrees
142 with the attorney's assessment, if the practitioner or provider
143 receives a presuit notice pursuant to chapter 766, or if the
144 practitioner or provider is named as a defendant.

145 Section 2. Paragraph (a) of subsection (5) and subsection

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146 (14) of section 766.102, Florida Statutes, are amended to read:
147 766.102 Medical negligence; standards of recovery; expert
148 witness.—

149 (5) A person may not give expert testimony concerning the
150 prevailing professional standard of care unless the person is a
151 health care provider who holds an active and valid license and
152 conducts a complete review of the pertinent medical records and
153 meets the following criteria:

154 (a) If the health care provider against whom or on whose
155 behalf the testimony is offered is a specialist, the expert
156 witness must:

157 1. Specialize in the same specialty as the health care
158 provider against whom or on whose behalf the testimony is
159 offered; ~~or specialize in a similar specialty that includes the~~
160 ~~evaluation, diagnosis, or treatment of the medical condition~~
161 ~~that is the subject of the claim and have prior experience~~
162 ~~treating similar patients;~~ and

163 2. Have devoted professional time during the 3 years
164 immediately preceding the date of the occurrence that is the
165 basis for the action to:

166 a. The active clinical practice of, or consulting with
167 respect to, the same ~~or similar~~ specialty ~~that includes the~~
168 ~~evaluation, diagnosis, or treatment of the medical condition~~
169 ~~that is the subject of the claim and have prior experience~~
170 ~~treating similar patients;~~

171 b. Instruction of students in an accredited health
172 professional school or accredited residency or clinical research
173 program in the same ~~or similar~~ specialty; or

174 c. A clinical research program that is affiliated with an

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175 accredited health professional school or accredited residency or
176 clinical research program in the same ~~or similar~~ specialty.

177 ~~(14) This section does not limit the power of the trial~~
178 ~~court to disqualify or qualify an expert witness on grounds~~
179 ~~other than the qualifications in this section.~~

180 Section 3. Paragraph (b) of subsection (6) of section
181 766.106, Florida Statutes, is amended to read:

182 766.106 Notice before filing action for medical negligence;
183 presuit screening period; offers for admission of liability and
184 for arbitration; informal discovery; review.—

185 (6) INFORMAL DISCOVERY.—

186 (b) Informal discovery may be used by a party to obtain
187 unsworn statements, the production of documents or things, and
188 physical and mental examinations, as follows:

189 1. Unsworn statements.—Any party may require other parties
190 to appear for the taking of an unsworn statement. Such
191 statements may be used only for the purpose of presuit screening
192 and are not discoverable or admissible in any civil action for
193 any purpose by any party. A party desiring to take the unsworn
194 statement of any party must give reasonable notice in writing to
195 all parties. The notice must state the time and place for taking
196 the statement and the name and address of the party to be
197 examined. Unless otherwise impractical, the examination of any
198 party must be done at the same time by all other parties. Any
199 party may be represented by counsel at the taking of an unsworn
200 statement. An unsworn statement may be recorded electronically,
201 stenographically, or on videotape. The taking of unsworn
202 statements is subject to the provisions of the Florida Rules of
203 Civil Procedure and may be terminated for abuses.

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204 2. Documents or things.—Any party may request discovery of
205 documents or things. The documents or things must be produced,
206 at the expense of the requesting party, within 20 days after the
207 date of receipt of the request. A party is required to produce
208 discoverable documents or things within that party's possession
209 or control. Medical records shall be produced as provided in s.
210 766.204.

211 3. Physical and mental examinations.—A prospective
212 defendant may require an injured claimant to appear for
213 examination by an appropriate health care provider. The
214 prospective defendant shall give reasonable notice in writing to
215 all parties as to the time and place for examination. Unless
216 otherwise impractical, a claimant is required to submit to only
217 one examination on behalf of all potential defendants. The
218 practicality of a single examination must be determined by the
219 nature of the claimant's condition, as it relates to the
220 liability of each prospective defendant. Such examination report
221 is available to the parties and their attorneys upon payment of
222 the reasonable cost of reproduction and may be used only for the
223 purpose of presuit screening. Otherwise, such examination report
224 is confidential and exempt from the provisions of s. 119.07(1)
225 and s. 24(a), Art. I of the State Constitution.

226 4. Written questions.—Any party may request answers to
227 written questions, the number of which may not exceed 30,
228 including subparts. A response must be made within 20 days after
229 receipt of the questions.

230 5. Interviews of treating health care providers.—A
231 prospective defendant or his or her legal representative may
232 interview the claimant's treating health care providers

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233 consistent with the authorization for release of protected
234 health information. This subparagraph does not require a
235 claimant's treating health care provider to submit to a request
236 for an interview. Notice of the intent to conduct an interview
237 shall be provided to the claimant or the claimant's legal
238 representative, who shall be responsible for arranging a
239 mutually convenient date, time, and location for the interview
240 within 15 days after the request is made. For subsequent
241 interviews, the prospective defendant or his or her
242 representative shall notify the claimant and his or her legal
243 representative at least 72 hours before the subsequent
244 interview. If the claimant's attorney fails to schedule an
245 interview, the prospective defendant or his or her legal
246 representative may attempt to conduct an interview without
247 further notice to the claimant or the claimant's legal
248 representative.

249 ~~6.5.~~ Unsworn statements of treating health care providers.-
250 A prospective defendant or his or her legal representative may
251 also take unsworn statements of the claimant's treating health
252 care providers. The statements must be limited to those areas
253 that are potentially relevant to the claim of personal injury or
254 wrongful death. Subject to the procedural requirements of
255 subparagraph 1., a prospective defendant may take unsworn
256 statements from a claimant's treating physicians. Reasonable
257 notice and opportunity to be heard must be given to the claimant
258 or the claimant's legal representative before taking unsworn
259 statements. The claimant or claimant's legal representative has
260 the right to attend the taking of such unsworn statements.

261 Section 4. Subsection (3) of section 766.1065, Florida

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262 Statutes, is amended to read:

263 766.1065 Authorization for release of protected health
264 information.—

265 (3) The authorization required by this section shall be in
266 the following form and shall be construed in accordance with the
267 “Standards for Privacy of Individually Identifiable Health
268 Information” in 45 C.F.R. parts 160 and 164:

269

270 AUTHORIZATION FOR RELEASE OF
271 PROTECTED HEALTH INFORMATION

272

273 A. I, (...Name of patient or authorized
274 representative...) [hereinafter “Patient”], authorize
275 that (...Name of health care provider to whom the
276 presuit notice is directed...) and his/her/its
277 insurer(s), self-insurer(s), and attorney(s), and the
278 designated treating health care provider(s) listed
279 below and his/her/its insurer(s), self-insurer(s), and
280 attorney(s) may obtain and disclose (within the
281 parameters set out below) the protected health
282 information described below for the following specific
283 purposes:

284 1. Facilitating the investigation and evaluation
285 of the medical negligence claim described in the
286 accompanying presuit notice; ~~or~~

287 2. Defending against any litigation arising out
288 of the medical negligence claim made on the basis of
289 the accompanying presuit notice; or—

290 3. Obtaining legal advice or representation

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291 arising out of the medical negligence claim described
292 in the accompanying presuit notice.

293 B. The health information obtained, used, or
294 disclosed extends to, and includes, ~~the~~ verbal health
295 information as well as ~~the~~ written health information
296 and is described as follows:

297 1. The health information in the custody of the
298 following health care providers who have examined,
299 evaluated, or treated the Patient in connection with
300 injuries complained of after the alleged act of
301 negligence: (List the name and current address of all
302 health care providers). This authorization extends to
303 any additional health care providers that may in the
304 future evaluate, examine, or treat the Patient for the
305 injuries complained of.

306 2. The health information in the custody of the
307 following health care providers who have examined,
308 evaluated, or treated the Patient during a period
309 commencing 2 years before the incident that is the
310 basis of the accompanying presuit notice.

311
312 (List the name and current address of such health care
313 providers, if applicable.)

314
315 C. This authorization does not apply to the
316 following list of health care providers possessing
317 health care information about the Patient because the
318 Patient certifies that such health care information is
319 not potentially relevant to the claim of personal

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320 injury or wrongful death that is the basis of the
321 accompanying presuit notice.
322

323 (List the name of each health care provider to whom
324 this authorization does not apply and the inclusive
325 dates of examination, evaluation, or treatment to be
326 withheld from disclosure. If none, specify "none.")
327

328 D. The persons or class of persons to whom the
329 Patient authorizes such health information to be
330 disclosed or by whom such health information is to be
331 used:

332 1. Any health care provider providing care or
333 treatment for the Patient.

334 2. Any liability insurer or self-insurer
335 providing liability insurance coverage, self-
336 insurance, or defense to any health care provider to
337 whom presuit notice is given, or to any health care
338 provider listed in subsections B.1.-2. above,
339 regarding the care and treatment of the Patient.

340 3. Any consulting or testifying expert employed
341 by or on behalf of (name of health care provider to
342 whom presuit notice was given) and his/her/its
343 insurer(s), self-insurer(s), or attorney(s) regarding
344 the matter of the presuit notice accompanying this
345 authorization.

346 4. Any attorney (including his/her ~~secretarial,~~
347 ~~clerical, or paralegal~~ staff) employed by or on behalf
348 of (name of health care provider to whom presuit

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349 notice was given) or employed by or on behalf of any
350 health care provider(s) listed in subsections B.1.-2.
351 above, regarding the matter of the presuit notice
352 accompanying this authorization or the care and
353 treatment of the Patient.

354 5. Any trier of the law or facts relating to any
355 suit filed seeking damages arising out of the medical
356 care or treatment of the Patient.

357 E. This authorization expressly allows the
358 persons or class of persons listed in subsections
359 D.2.-4. above to interview the health care providers
360 listed in subsections B.1.-2. above, without the
361 presence of the Patient or the Patient's attorney.

362 ~~F.F.~~ This authorization expires upon resolution
363 of the claim or at the conclusion of any litigation
364 instituted in connection with the matter of the
365 presuit notice accompanying this authorization,
366 whichever occurs first.

367 ~~G.F.~~ The Patient understands that, without
368 exception, the Patient has the right to revoke this
369 authorization in writing. The Patient further
370 understands that the consequence of any such
371 revocation is that the presuit notice under s.
372 766.106(2), Florida Statutes, is deemed retroactively
373 void from the date of issuance, and any tolling effect
374 that the presuit notice may have had on any applicable
375 statute-of-limitations period is retroactively
376 rendered void.

377 ~~H.G.~~ The Patient understands that signing this

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378 authorization is not a condition for continued
379 treatment, payment, enrollment, or eligibility for
380 health plan benefits.

381 ~~I.H.~~ The Patient understands that information
382 used or disclosed under this authorization may be
383 subject to additional disclosure by the recipient and
384 may not be protected by federal HIPAA privacy
385 regulations.

386
387 Signature of Patient/Representative:

388 Date:

389 Name of Patient/Representative:

390 Description of Representative's Authority:

391 Section 5. Paragraph (c) of subsection (7) of section
392 381.028, Florida Statutes, is amended to read:

393 381.028 Adverse medical incidents.—

394 (7) PRODUCTION OF RECORDS.—

395 (c)1. Fees charged by a health care facility for copies of
396 records requested by a patient under s. 25, Art. X of the State
397 Constitution may not exceed the reasonable and actual cost of
398 complying with the request, including a reasonable charge for
399 the staff time necessary to search for records and prevent the
400 disclosure of the identity of any patient involved in the
401 adverse medical incident through redaction or other means as
402 required by the Health Insurance Portability and Accountability
403 Act of 1996 or its implementing regulations. The health care
404 facility may require payment, in full or in part, before acting
405 on the records request.

406 2. Fees charged by a health care provider for copies of

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407 records requested by a patient under s. 25, Art. X of the State
408 Constitution may not exceed the amount established under s.
409 456.057(17) ~~s. 456.057(18)~~, which may include a reasonable
410 charge for the staff time necessary to prevent the disclosure of
411 the identity of any patient involved in the adverse medical
412 incident through redaction or other means as required by the
413 Health Insurance Portability and Accountability Act of 1996 or
414 its implementing regulations. The health care provider may
415 require payment, in full or in part, before acting on the
416 records request.

417 Section 6. (1) The amendments made by this act to ss.
418 456.057, 766.106, and 766.1065, Florida Statutes, apply to
419 causes of action accruing before, on, or after the effective
420 date of this act.

421 (2) The amendments made by this act to s. 766.102, Florida
422 Statutes, apply to causes of action accruing on or after the
423 effective date of this act.

424 Section 7. This act shall take effect July 1, 2013.