A bill to be entitled

An act relating to medical negligence; amending s. 766.102, F.S.; providing criteria for an expert witness giving certain testimony; creating s. 766.1025, F.S.; prohibiting certain policies which discourage providing expert testimony as against public policy; creating s. 766.1026, F.S.; providing a civil remedy for a violation of s. 766.1025, F.S.; amending s. 766.202, F.S.; redefining the term “medical expert”; amending s. 766.104, F.S.; increasing an automatic extension of the statute of limitations in certain medical negligence cases; amending s. 766.106, F.S.; providing additional requirements with respect to notice before filing an action for medical malpractice; providing requirements with respect to certain responses; providing for sworn statements; providing for written questions; amending s. 766.113, F.S.; prohibiting settlement agreements restricting disclosure; amending s. 766.205, F.S.; revising language with respect to presuit discovery of medical negligence claims and defenses; amending s. 766.206, F.S.; providing additional requirements with respect to presuit investigation of medical negligence claims; creating s. 766.2075, F.S.; providing for mandatory mediation; providing for the apportionment of fault with respect to medical malpractice; providing for application; providing effective dates.

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

Section 1. Section 766.102, Florida Statutes, is amended to read:

766.102 Medical negligence; standards of recovery.--

(1) In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s. 768.50(2)(b), the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be 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.

(2) A person may not give expert testimony concerning the prevailing professional standard of care unless that person is a licensed health care provider and meets the following criteria:

(a) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:

1. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or

2. Specialize in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the complaint and have prior experience treating similar patients.

(b) During the 3 years immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted professional time to:

1. The active clinical practice of, or consulting with respect to, the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered and, if that health care provider is a specialist, the active clinical practice of, or consulting with respect to, the same specialty or a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the action and have prior experience treating similar patients;

2. The instruction of students in an accredited health professional school or accredited residency program in the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered and, if that health care provider is a specialist, an accredited health professional school or accredited residency or clinical research program in the same or similar specialty; or

3. A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered and, if that health care provider is a specialist, a clinical research program that is affiliated with an accredited health professional school or accredited residency or clinical research program in the same or similar specialty.

(3) Notwithstanding subsection (2), if the health care provider against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the 3 years immediately preceding the date of the occurrence that is the basis for the action, must have devoted his or her professional time to:

(a) Active clinical practice or consultation as a general practitioner;

(b) Instruction of students in an accredited health professional school or accredited residency program in the general practice of medicine; or

(c) A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the general practice of medicine.

(4) Notwithstanding subsection (2), a physician licensed under chapter 458 or chapter 459 who qualifies as an expert under this section and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of such medical support staff.

(5) In an action alleging medical malpractice, an expert witness may not testify on a contingency fee basis.

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

(7) Notwithstanding subsection (2), in a medical malpractice action against a hospital or other health care or medical facility, a person may give expert testimony on the appropriate standard of care as to administrative and other nonclinical issues if the person has substantial knowledge, by virtue of his or her training and experience, concerning the standard of care among hospitals or health care or medical facilities of the same type as the hospital, health care

facility, or medical facility whose actions or inactions are the subject of this testimony and which are located in the same or similar communities at the time of the alleged act giving rise to the cause of action.

~~(2)(a) If the health care provider whose negligence is claimed to have created the cause of action is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself or herself out as a specialist, a "similar health care provider" is one who:~~

~~1. Is licensed by the appropriate regulatory agency of this state;~~

~~2. Is trained and experienced in the same discipline or school of practice; and~~

~~3. Practices in the same or similar medical community.~~

~~(b) If the health care provider whose negligence is claimed to have created the cause of action is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself or herself out as a specialist, a "similar health care provider" is one who:~~

~~1. Is trained and experienced in the same specialty; and~~

~~2. Is certified by the appropriate American board in the same specialty.~~

~~However, if any health care provider described in this paragraph is providing treatment or diagnosis for a condition which is not within his or her specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a "similar health care provider."~~

~~(c) The purpose of this subsection is to establish a relative standard of care for various categories and classifications of health care providers. Any health care provider may testify as an expert in any action if he or she:~~

~~1. Is a similar health care provider pursuant to paragraph (a) or paragraph (b); or~~

~~2. Is not a similar health care provider pursuant to paragraph (a) or paragraph (b) but, to the satisfaction of the court, possesses sufficient training, experience, and knowledge as a result of practice or teaching in the specialty of the defendant or practice or teaching in a related field of medicine, so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine. Such training, experience, or knowledge must be as a result of the active involvement in the practice or teaching of medicine within the 5-year period before the incident giving rise to the claim.~~

(8)~~(3)~~(a) If the injury is claimed to have resulted from the negligent affirmative medical intervention of the health care provider, the claimant must, in order to prove a breach of the prevailing professional standard of care, show that the injury was not within the necessary or reasonably foreseeable results of the surgical, medicinal, or diagnostic procedure constituting the medical intervention, if the intervention from which the injury is alleged to have resulted was carried out in accordance with the prevailing professional standard of care by a reasonably prudent similar health care provider.

(b) The provisions of this subsection shall apply only when the medical intervention was undertaken with the informed

consent of the patient in compliance with the provisions of s. 766.103.

(9)~~(4)~~ The existence of a medical injury shall not create any inference or presumption of negligence against a health care provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the health care provider. However, the discovery of the presence of a foreign body, such as a sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures, shall be prima facie evidence of negligence on the part of the health care provider.

(10)~~(5)~~ The Legislature is cognizant of the changing trends and techniques for the delivery of health care in this state and the discretion that is inherent in the diagnosis, care, and treatment of patients by different health care providers. The failure of a health care provider to order, perform, or administer supplemental diagnostic tests shall not be actionable if the health care provider acted in good faith and with due regard for the prevailing professional standard of care.

(11)~~(6)~~(a) In any action for damages involving a claim of negligence against a physician licensed under chapter 458, osteopathic physician licensed under chapter 459, podiatric physician licensed under chapter 461, or chiropractic physician licensed under chapter 460 providing emergency medical services in a hospital emergency department, the court shall admit expert medical testimony only from physicians, osteopathic physicians, podiatric physicians, and chiropractic physicians who have had substantial professional experience within the preceding 5 years

while assigned to provide emergency medical services in a hospital emergency department.

(b) For the purposes of this subsection:

1. The term "emergency medical services" means those medical services required for the immediate diagnosis and treatment of medical conditions which, if not immediately diagnosed and treated, could lead to serious physical or mental disability or death.

2. "Substantial professional experience" shall be determined by the custom and practice of the manner in which emergency medical coverage is provided in hospital emergency departments in the same or similar localities where the alleged negligence occurred.

(12) However, if any health care providers described in subsection (2), subsection (3), or subsection (4) are providing treatment or diagnosis for a condition that is not within his or her specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a "similar health care provider."

Section 2. Section 766.1025, Florida Statutes, is created to read:

766.1025 Prohibited policies.--Any policy, written or oral, of any private or public educational institution, any private or public health care facility, any professional association, any pharmaceutical corporation, any manufacturer of a drug, medical product, or medical device, any insurer, self-insurance trust, risk retention group, joint underwriting association, fund, or similar entity, or any health maintenance organization which prohibits or discourages providing expert testimony shall be void as against public policy.

Section 3. Section 766.1026, Florida Statutes, is created to read:

766.1026 Civil remedy.--Any person may bring a civil action to:

(1) Enjoin a person or entity who has violated or is violating the provisions of s. 766.1025.

(2) Obtain a civil penalty of not more than $10,000 for each violation.

Upon proof that the prohibited policy exists, there shall arise a rebuttable presumption that the existence of the policy caused irreparable injury to the claimant. The burden then shifts to the defendant institution to prove by a preponderance of the evidence that the claimant was not injured by demonstrating that, in the absence of the policy, the witness would nevertheless have not allowed himself or herself to be retained by the claimant. In any civil action involving a violation of the provisions of s. 766.1025 where an injury has occurred, reasonable attorney's fees and costs shall be awarded to the prevailing party. The award of fees and costs shall become part of the judgment and subject to execution as the law allows.

Section 4. Subsection (5) of section 766.202, Florida Statutes, is amended to read:

766.202 Definitions; ss. 766.201-766.212.--As used in ss. 766.201-766.212, the term:

(5) "Medical expert" means a person duly and regularly engaged in the practice of his or her profession who holds a health care professional degree from a university or college and has had special professional training, knowledge, or ~~and~~ experience ~~or one possessed of special health care knowledge or~~

~~skill~~ about the subject upon which he or she is called to testify or provide an opinion and is familiar with the evaluation, diagnosis, or treatment of the medical condition at issue. Such expert shall certify that he or she has had experience in the evaluation, diagnosis, or treatment of this condition. In order to avoid the appearance of impropriety, a medical expert opinion submitted on behalf of a defendant shall not be provided by a member of the same self-insurance trust or risk retention group as the defendant, by a health care professional who is insured by the same professional liability insurance carrier as the defendant, or by a health care provider who is employed by the same employer as the defendant or in a professional association, partnership, or joint venture with the defendant.

Section 5. Subsection (2) of section 766.104, Florida Statutes, is amended to read:

766.104 Pleading in medical negligence cases; claim for punitive damages; authorization for release of records for investigation.--

(2) Upon petition to the clerk of the court where the suit will be filed and payment to the clerk of a filing fee, not to exceed $25, established by the chief judge, an automatic 180-day ~~90-day~~ extension of the statute of limitations shall be granted to allow the reasonable investigation required by subsection (1). This period shall be in addition to other tolling periods. No court order is required for the extension to be effective. The provisions of this subsection shall not be deemed to revive a cause of action on which the statute of limitations has run.

Section 6. Effective October 1, 2003, and applicable to notices of intent to litigate sent on or after that date,

subsection (2), paragraph (b) of subsection (3), and subsection (7) of section 766.106, Florida Statutes, are amended to read:

766.106 Notice before filing action for medical malpractice; presuit screening period; offers for admission of liability and for arbitration; informal discovery; review.--

(2) After completion of presuit investigation pursuant to s. 766.203 and prior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant by certified mail, return receipt requested, of intent to initiate litigation for medical malpractice. Notice to each prospective defendant must include, if available, a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of malpractice and all known health care providers during the 5-year period prior to the alleged act of malpractice, and copies of the medical records relied upon by the expert in signing the affidavit. The requirement of providing the list of known health care providers shall not serve as grounds for the imposition of sanctions for failure to provide presuit discovery. Following the initiation of a suit alleging medical malpractice with a court of competent jurisdiction, and service of the complaint upon a defendant, the claimant shall provide a copy of the complaint to the Department of Health. The requirement of providing the complaint to the Department of Health does not impair the claimant's legal rights or ability to seek relief for his or her claim. The Department of Health shall review each incident and determine whether it involved conduct by a licensee which is potentially subject to disciplinary action, in which case the provisions of s. 456.073 apply.

(3)(b) At or before the end of the 90 days, the insurer or self-insurer shall provide the claimant with a response:

1. Rejecting the claim and submitting corroboration of lack of reasonable grounds for medical negligence litigation in accordance with s. 766.203(3) that sets forth a factual basis for denial;

2. Making a settlement offer; or

3. Making an offer to arbitrate where liability will be deemed admitted and the arbitration will be held ~~of admission of liability and for arbitration~~ on the issue of damages. This offer may be made contingent upon a limit of general damages.

Such response must include a copy of any insurance policy and applicable policy limits. If the prospective defendant intends to deny liability should a lawsuit be filed notwithstanding a settlement offer, an affidavit corroborating lack of reasonable grounds for medical negligence must be submitted that meets the requirements of s. 766.203(3) and that sets forth a factual basis for the denial of liability. Any response must also include all affirmative defense the prospective defendant intends to raise and a corroborating expert witness affidavit for each potential defendant whom the responding defendant contends is liable for the injuries complained of and who has not been sent a notice of intent to litigate by the claimant.

(7) Informal discovery may be used by a party to obtain sworn ~~unsworn~~ statements, the production of documents or things, ~~and~~ physical and mental examinations, and answers to written questions, as follows:

(a) *Sworn ~~Unsworn~~ statements; parties.*--Any party may require other health care providers or parties to appear for the

taking of a sworn ~~an unsworn~~ statement. ~~Such statements may be used only for the purpose of presuit screening and are not discoverable or admissible in any civil action for any purpose by any party.~~ A party desiring to take the sworn ~~unsworn~~ statement of any party or health care provider must provide ~~give~~ reasonable written notice and opportunity to be present ~~in writing~~ to all parties. The notice must state the time and place for taking the statement and the name and address of the party or health care provider to be examined. ~~Unless otherwise impractical,~~ The examination of any party or health care provider must be done at the same time by all other parties. Any party or health care provider may be represented by counsel at the taking of a sworn ~~an unsworn~~ statement. A sworn ~~An unsworn~~ statement may be recorded electronically, stenographically, or on videotape. The taking of sworn ~~unsworn~~ statements is subject to the provisions of the Florida Rules of Civil Procedure and may be terminated for abuses. The taking of a sworn statement during presuit shall not preclude a party from updating the sworn statement by deposition.

(b) *Documents or things.*--Any party may request discovery of documents or things. The documents or things must be produced, at the expense of the requesting party, within 20 days after the date of receipt of the request. A party is required to produce discoverable documents or things within that party's possession or control.

(c) *Physical and mental examinations.*--A prospective defendant may require an injured prospective claimant to appear for examination by an appropriate health care provider. The defendant shall give reasonable notice in writing to all parties as to the time and place for examination. Unless otherwise

impractical, a prospective claimant is required to submit to only one examination on behalf of all potential defendants. The practicality of a single examination must be determined by the nature of the potential claimant's condition, as it relates to the liability of each potential defendant. Such examination report is available to the parties and their attorneys upon payment of the reasonable cost of reproduction and may be used only for the purpose of presuit screening. Otherwise, such examination report is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

(d) *Written questions*.--Any party may request answers to no more than thirty written questions, including subparts, which shall be responded to within 20 days of receipt.

Section 7. Section 766.113, Florida Statutes, is amended to read:

766.113 Settlement agreements; prohibition on restricting disclosure ~~to Division of Medical Quality Assurance~~.--A settlement agreement involving a claim for medical malpractice shall not prohibit any party to the agreement from discussing the settlement amount or ~~with or reporting to the Division of Medical Quality Assurance~~ the events giving rise to the claim.

Section 8. Subsection (4) of section 766.205, Florida Statutes, is amended to read:

766.205 Presuit discovery of medical negligence claims and defenses.--

(4) With the exception of sworn statements taken pursuant to s. 766.106(7)(a), no statement, discussion, written document, report, or other work product generated solely by the presuit investigation process is discoverable or admissible in any civil

action for any purpose by the opposing party. All participants, including, but not limited to, hospitals and other medical facilities, and the officers, directors, trustees, employees, and agents thereof, physicians, investigators, witnesses, and employees or associates of the defendant, are immune from civil liability arising from participation in the presuit investigation process. Such immunity from civil liability includes immunity for any acts by a medical facility in connection with providing medical records pursuant to s. 766.204(1) regardless of whether the medical facility is or is not a defendant.

Section 9. Effective October 1, 2003, and applicable to notices of intent to litigate sent on or after that date, section 766.206, Florida Statutes, is amended to read:

766.206 Presuit investigation of medical negligence claims and defenses by court.--

(1) After the completion of presuit investigation by the parties pursuant to s. 766.203 and any informal discovery pursuant to s. 766.106, any party may file a motion in the circuit court requesting the court to determine whether the opposing party's claim or denial rests on a reasonable basis.

(2) If the court finds that the notice of intent to initiate litigation mailed by the claimant is not in compliance with the reasonable investigation requirements of ss. 766.201-766.212, <u>including a review of the claim and a verified written medical expert opinion by an expert witness as defined in s. 766.202(5),</u> the court shall dismiss the claim, and the person who mailed such notice of intent, whether the claimant or the claimant's attorney, shall be personally liable for all attorney's fees and costs incurred during the investigation and

evaluation of the claim, including the reasonable attorney's fees and costs of the defendant or the defendant's insurer.

(3) If the court finds that the response mailed by a defendant rejecting the claim is not in compliance with the reasonable investigation requirements of ss. 766.201-766.212, including a review of the claim and a verified written medical expert opinion by an expert witness as defined in s. 766.202(5), the court shall strike the defendant's pleading and the case will proceed to trial on the issue of damages. ~~response, and~~ The person who mailed such response, whether the defendant, the defendant's insurer, or the defendant's attorney, shall be personally liable for all attorney's fees and costs incurred during the investigation and evaluation of the claim, including the reasonable attorney's fees and costs of the claimant.

(4) If the court finds that an attorney for the claimant mailed notice of intent to initiate litigation without reasonable investigation, or filed a medical negligence claim without first mailing such notice of intent which complies with the reasonable investigation requirements, or if the court finds that an attorney for a defendant mailed a response rejecting the claim without reasonable investigation, the court shall submit its finding in the matter to The Florida Bar for disciplinary review of the attorney. Any attorney so reported three or more times within a 5-year period shall be reported to a circuit grievance committee acting under the jurisdiction of the Supreme Court. If such committee finds probable cause to believe that an attorney has violated this section, such committee shall forward to the Supreme Court a copy of its finding.

(5)(a) If the court finds that the corroborating written medical expert opinion attached to any notice of claim or intent

or to any response rejecting a claim lacked reasonable investigation, or that the medical expert submitting the opinion did not meet the expert witness qualifications as set forth in s. 766.202(5), the court shall report the medical expert issuing such corroborating opinion to the Division of Medical Quality Assurance or its designee. If such medical expert is not a resident of the state, the division shall forward such report to the disciplining authority of that medical expert.

(b) The court shall ~~may~~ refuse to consider the testimony of ~~such~~ an expert whose medical expert witness opinion attached to any notice of intent or to any response rejecting a claim ~~who~~ has been disqualified three times pursuant to this section.

Section 10. Section 766.2075, Florida Statutes, is created to read:

766.2075 Mandatory mediation.--

(1) Within 120 days after suit being filed, the parties shall conduct mandatory mediation in accordance with s. 44.102, if binding arbitration under s. 766.106 or s. 766.207 has not been agreed to by the parties. The Florida Rules of Civil Procedure shall apply to mediation held pursuant to this section. During the mediation, each party shall make a demand for judgment or an offer of settlement. At the conclusion of the mediation, the mediator shall record the final demand and final offer to provide to the court upon the rendering of a judgment.

(2) If a claimant rejecting the final offer of settlement made during the mediation does not obtain a judgment more favorable than the offer, the court shall assess the mediation costs and reasonable costs, expenses, and attorney’s fees which were incurred after the date of mediation. The assessment shall attach to the proceeds of the claimant and shall be attributable

to any defendant whose final offer was more favorable than the judgment.

(3) If the judgment obtained at trial is not more favorable to a defendant than the final demand for judgment made by the claimant to the defendant during mediation, the court shall assess the mediation costs and reasonable costs, expenses, and attorney's fees which were incurred after the date of mediation. Prejudgment interest at the rate established in s. 55.03 from the date of the final demand shall also be assessed. The defendant and the insurer of the defendant, if any, shall be liable for the costs, fees, and interest awardable under this section.

(4) The final offer and final demand made during the mediation required in this section shall be the only offer and demand considered by the court in assessing costs, expenses, attorney's fees, and prejudgment interest under this section. No subsequent offer or demand by either party shall apply in the determination of whether sanctions will be assessed by the court under this section.

(5) Notwithstanding any provision of law to the contrary, s. 45.061 and s. 768.79 shall not be applicable to medical negligence or to wrongful death cases arising out of medical negligence causes of action.

Section 11. Notwithstanding any provision of law to the contrary, in an action for damages for personal injury or wrongful death arising out of medical malpractice, whether in contract or tort, the trier of fact shall apportion the total fault only among the claimant and all joint tortfeasors who are parties to the action when the case is submitted to the jury for deliberation and the rendition of a verdict.

Section 12. Except as otherwise provided herein, this act shall take effect July 1, 2003, and shall apply to causes of action filed on or after that date.