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1  
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~~ 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.E.~~ 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.