

FOR CONSIDERATION By the Committee on Judiciary

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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; authorizing a medical
12 liability insurer to recommend an attorney to a health
13 care practitioner or provider under certain
14 circumstances; restricting the health care
15 practitioner's or provider's attorney from disclosing
16 information to the medical liability insurer under
17 certain circumstances; authorizing the health care
18 practitioner's or provider's attorney to represent the
19 insurer or other insureds of the insurer in unrelated
20 matters; specifying exceptions to the limitations on
21 disclosures by the attorney to the insurer of the
22 practitioner or provider; amending s. 766.102, F.S.;
23 revising qualifications to give expert testimony on
24 the prevailing professional standard of care; deleting
25 provision regarding limitations of section; amending
26 s. 766.106, F.S.; providing that a prospective
27 defendant may conduct an ex parte interview with a
28 claimant's treating health care provider as a tool of
29 informal discovery; amending s. 766.1065, F.S.;

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

43
44 Be It Enacted by the Legislature of the State of Florida:

45
46 Section 1. Subsections (7) and (8) of section 456.057,
47 Florida Statutes, are amended, and present subsections (9)
48 through (21) of that section are renumbered as subsections (8)
49 through (20), respectively, to read:

50 456.057 Ownership and control of patient records; report or
51 copies of records to be furnished; disclosure of information.-

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

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59 such records may be furnished without written authorization
60 under the following circumstances:

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

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

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

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

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

83 (b) Absent a specific written release or authorization
84 permitting utilization of patient information for solicitation
85 or marketing the sale of goods or services, any use of that
86 information for those purposes is prohibited.

87 (c) ~~(8) Except in a medical negligence action or~~

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

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

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

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

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

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

115 a. If the medical liability insurer of a health care
116 practitioner or provider described in this subparagraph

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117 represents a defendant or prospective defendant in a medical
118 negligence action:

119 (I) The insurer may not select an attorney for the
120 practitioner or the provider. However, the insurer may recommend
121 attorneys who do not represent a defendant or prospective
122 defendant in the matter.

123 (II) The attorney selected by the practitioner or the
124 provider may not, directly or indirectly, disclose to the
125 insurer any information relating to the representation of the
126 practitioner or the provider other than the categories of work
127 performed or the amount of time applicable to each category for
128 billing or reimbursement purposes. The attorney selected by the
129 practitioner or the provider may represent the insurer or other
130 insureds of the insurer in an unrelated matter.

131 b. The limitations in this subparagraph do not apply if the
132 attorney reasonably expects the practitioner or provider to be
133 named as a defendant and the practitioner or provider agrees
134 with the attorney's assessment, if the practitioner or provider
135 receives a presuit notice pursuant to chapter 766, or if the
136 practitioner or provider is named as a defendant.

137 Section 2. Paragraph (a) of subsection (5) and subsection
138 (14) of section 766.102, Florida Statutes, are amended to read:
139 766.102 Medical negligence; standards of recovery; expert
140 witness.—

141 (5) A person may not give expert testimony concerning the
142 prevailing professional standard of care unless the person is a
143 health care provider who holds an active and valid license and
144 conducts a complete review of the pertinent medical records and
145 meets the following criteria:

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146 (a) If the health care provider against whom or on whose
147 behalf the testimony is offered is a specialist, the expert
148 witness must:

149 1. Specialize in the same specialty as the health care
150 provider against whom or on whose behalf the testimony is
151 offered; ~~or specialize in a similar specialty that includes the~~
152 ~~evaluation, diagnosis, or treatment of the medical condition~~
153 ~~that is the subject of the claim and have prior experience~~
154 ~~treating similar patients;~~ and

155 2. Have devoted professional time during the 3 years
156 immediately preceding the date of the occurrence that is the
157 basis for the action to:

158 a. The active clinical practice of, or consulting with
159 respect to, the same ~~or 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;~~

163 b. Instruction of students in an accredited health
164 professional school or accredited residency or clinical research
165 program in the same ~~or similar specialty;~~ or

166 c. A clinical research program that is affiliated with an
167 accredited health professional school or accredited residency or
168 clinical research program in the same ~~or similar specialty.~~

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

172 Section 3. Paragraph (b) of subsection (6) of section
173 766.106, Florida Statutes, is amended to read:

174 766.106 Notice before filing action for medical negligence;

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175 presuit screening period; offers for admission of liability and
176 for arbitration; informal discovery; review.—

177 (6) INFORMAL DISCOVERY.—

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

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

196 2. Documents or things.—Any party may request discovery of
197 documents or things. The documents or things must be produced,
198 at the expense of the requesting party, within 20 days after the
199 date of receipt of the request. A party is required to produce
200 discoverable documents or things within that party's possession
201 or control. Medical records shall be produced as provided in s.
202 766.204.

203 3. Physical and mental examinations.—A prospective

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

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

222 5. Ex parte interviews of treating health care providers.—A
223 prospective defendant or his or her legal representative may
224 interview the claimant's treating health care providers without
225 notice to, or the presence of, the claimant or the claimant's
226 legal representative.

227 6.5. Unsworn statements of treating health care providers.—
228 A prospective defendant or his or her legal representative may
229 also take unsworn statements of the claimant's treating health
230 care providers. The statements must be limited to those areas
231 that are potentially relevant to the claim of personal injury or
232 wrongful death. Subject to the procedural requirements of

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233 subparagraph 1., a prospective defendant may take unsworn
234 statements from a claimant's treating physicians. Reasonable
235 notice and opportunity to be heard must be given to the claimant
236 or the claimant's legal representative before taking unsworn
237 statements. The claimant or claimant's legal representative has
238 the right to attend the taking of such unsworn statements.

239 Section 4. Subsection (3) of section 766.1065, Florida
240 Statutes, is amended to read:

241 766.1065 Authorization for release of protected health
242 information.—

243 (3) The authorization required by this section shall be in
244 the following form and shall be construed in accordance with the
245 "Standards for Privacy of Individually Identifiable Health
246 Information" in 45 C.F.R. parts 160 and 164:

247
248 AUTHORIZATION FOR RELEASE OF
249 PROTECTED HEALTH INFORMATION

250
251 A. I, (...Name of patient or authorized
252 representative...) [hereinafter "Patient"], authorize
253 that (...Name of health care provider to whom the
254 presuit notice is directed...) and his/her/its
255 insurer(s), self-insurer(s), and attorney(s), and the
256 designated treating health care provider(s) listed
257 below and his/her/its insurer(s), self-insurer(s), and
258 attorney(s) may obtain and disclose (within the
259 parameters set out below) the protected health
260 information described below for the following specific
261 purposes:

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262 1. Facilitating the investigation and evaluation
263 of the medical negligence claim described in the
264 accompanying presuit notice; ~~or~~

265 2. Defending against any litigation arising out
266 of the medical negligence claim made on the basis of
267 the accompanying presuit notice; ~~or~~

268 3. Obtaining legal advice or representation
269 arising out of the medical negligence claim described
270 in the accompanying presuit notice.

271 B. The health information obtained, used, or
272 disclosed extends to, and includes, ~~the~~ verbal health
273 information as well as ~~the~~ written health information
274 and is described as follows:

275 1. The health information in the custody of the
276 following health care providers who have examined,
277 evaluated, or treated the Patient in connection with
278 injuries complained of after the alleged act of
279 negligence: (List the name and current address of all
280 health care providers). This authorization extends to
281 any additional health care providers that may in the
282 future evaluate, examine, or treat the Patient for the
283 injuries complained of.

284 2. The health information in the custody of the
285 following health care providers who have examined,
286 evaluated, or treated the Patient during a period
287 commencing 2 years before the incident that is the
288 basis of the accompanying presuit notice.

289
290 (List the name and current address of such health care

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291 providers, if applicable.)

292

293 C. This authorization does not apply to the
294 following list of health care providers possessing
295 health care information about the Patient because the
296 Patient certifies that such health care information is
297 not potentially relevant to the claim of personal
298 injury or wrongful death that is the basis of the
299 accompanying presuit notice.

300

301 (List the name of each health care provider to whom
302 this authorization does not apply and the inclusive
303 dates of examination, evaluation, or treatment to be
304 withheld from disclosure. If none, specify "none.")

305

306 D. The persons or class of persons to whom the
307 Patient authorizes such health information to be
308 disclosed or by whom such health information is to be
309 used:

310 1. Any health care provider providing care or
311 treatment for the Patient.

312 2. Any liability insurer or self-insurer
313 providing liability insurance coverage, self-
314 insurance, or defense to any health care provider to
315 whom presuit notice is given, or to any health care
316 provider listed in subsections B.1.-2. above,
317 regarding the care and treatment of the Patient.

318 3. Any consulting or testifying expert employed
319 by or on behalf of (name of health care provider to

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320 whom presuit notice was given) and his/her/its
321 insurer(s), self-insurer(s), or attorney(s) regarding
322 the matter of the presuit notice accompanying this
323 authorization.

324 4. Any attorney (including his/her ~~secretarial,~~
325 ~~clerical, or paralegal~~ staff) employed by or on behalf
326 of (name of health care provider to whom presuit
327 notice was given) or employed by or on behalf of any
328 health care provider(s) listed in subsections B.1.-2.
329 above, regarding the matter of the presuit notice
330 accompanying this authorization or the care and
331 treatment of the Patient.

332 5. Any trier of the law or facts relating to any
333 suit filed seeking damages arising out of the medical
334 care or treatment of the Patient.

335 E. This authorization expressly allows the
336 persons or class of persons listed in subsections
337 D.2.-4. above to interview the health care providers
338 listed in subsections B.1.-2. above, without notice to
339 or the presence of the Patient or the Patient's
340 attorney.

341 ~~F.E.~~ This authorization expires upon resolution
342 of the claim or at the conclusion of any litigation
343 instituted in connection with the matter of the
344 presuit notice accompanying this authorization,
345 whichever occurs first.

346 ~~G.F.~~ The Patient understands that, without
347 exception, the Patient has the right to revoke this
348 authorization in writing. The Patient further

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349 understands that the consequence of any such
350 revocation is that the presuit notice under s.
351 766.106(2), Florida Statutes, is deemed retroactively
352 void from the date of issuance, and any tolling effect
353 that the presuit notice may have had on any applicable
354 statute-of-limitations period is retroactively
355 rendered void.

356 ~~H.G.~~ The Patient understands that signing this
357 authorization is not a condition for continued
358 treatment, payment, enrollment, or eligibility for
359 health plan benefits.

360 ~~I.H.~~ The Patient understands that information
361 used or disclosed under this authorization may be
362 subject to additional disclosure by the recipient and
363 may not be protected by federal HIPAA privacy
364 regulations.

366 Signature of Patient/Representative:

367 Date:

368 Name of Patient/Representative:

369 Description of Representative's Authority:

370 Section 5. Paragraph (c) of subsection (7) of section
371 381.028, Florida Statutes, is amended to read:

372 381.028 Adverse medical incidents.—

373 (7) PRODUCTION OF RECORDS.—

374 (c)1. Fees charged by a health care facility for copies of
375 records requested by a patient under s. 25, Art. X of the State
376 Constitution may not exceed the reasonable and actual cost of
377 complying with the request, including a reasonable charge for

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378 the staff time necessary to search for records and prevent the
379 disclosure of the identity of any patient involved in the
380 adverse medical incident through redaction or other means as
381 required by the Health Insurance Portability and Accountability
382 Act of 1996 or its implementing regulations. The health care
383 facility may require payment, in full or in part, before acting
384 on the records request.

385 2. Fees charged by a health care provider for copies of
386 records requested by a patient under s. 25, Art. X of the State
387 Constitution may not exceed the amount established under s.
388 456.057(17) ~~s. 456.057(18)~~, which may include a reasonable
389 charge for the staff time necessary to prevent the disclosure of
390 the identity of any patient involved in the adverse medical
391 incident through redaction or other means as required by the
392 Health Insurance Portability and Accountability Act of 1996 or
393 its implementing regulations. The health care provider may
394 require payment, in full or in part, before acting on the
395 records request.

396 Section 6. This act shall take effect July 1, 2013.