

By Senator Thrasher

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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.; deleting a provision  
4           prohibiting the discussion of a patient's medical  
5           condition; providing circumstance under which patient  
6           records may be released without prior written  
7           authorization; revising conditions under which  
8           confidential patient information acquired in the  
9           course of care or treatment may be disclosed by a  
10          health care practitioner; amending s. 766.102, F.S.;  
11          establishing standard of proof in actions based on the  
12          failure of a health care provider to order, perform,  
13          or administer certain tests; shifting burden of proof  
14          to claimant; revising qualifications to give expert  
15          testimony on the prevailing professional standard of  
16          care; deleting provision regarding limitations of  
17          section; amending s. 766.106, F.S.; providing that a  
18          prospective defendant may conduct an ex parte  
19          interview with a claimant's treating health care  
20          provider as a tool of informal discovery; amending s.  
21          766.1065, F.S.; revising the form for the  
22          authorization for release of protected health  
23          information; providing for the release of protected  
24          health information to certain treating health care  
25          providers, insurers, and attorneys; authorizing a  
26          treating health care provider, insurer, or attorney to  
27          use protected health information in connection with  
28          legal services relating to a medical negligence claim;  
29          authorizing certain individuals and entities to

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30 conduct ex parte interviews with the claimant's health  
 31 care providers; creating s. 766.1091, F.S.;  
 32 authorizing a health care provider or health care  
 33 clinic and a patient or prospective patient to agree  
 34 to submit a claim of medical negligence to  
 35 arbitration; requiring that the arbitration agreement  
 36 be governed by ch. 682, F.S.; authorizing the  
 37 arbitration agreement to contain a provision that  
 38 limits an award of damages; amending s. 768.0981,  
 39 F.S.; prescribing limitations on medical negligence  
 40 actions against hospitals; providing an effective  
 41 date.

42  
 43 Be It Enacted by the Legislature of the State of Florida:

44  
 45 Section 1. Subsections (7) and (8) of section 456.057,  
 46 Florida Statutes, are amended to read:

47 456.057 Ownership and control of patient records; report or  
 48 copies of records to be furnished.—

49 (7) (a) Except as otherwise provided in this section and in  
 50 s. 440.13(4) (c), such records may not be furnished to, ~~and the~~  
 51 ~~medical condition of a patient may not be discussed with,~~ any  
 52 person other than the patient, or the patient's legal  
 53 representative, or other health care practitioners and providers  
 54 involved in the patient's care or treatment ~~of the patient,~~  
 55 except upon written authorization from ~~of~~ the patient. However,  
 56 such records may be furnished without written authorization  
 57 under the following circumstances:

58 1. To any person, firm, or corporation that has procured or

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59 furnished such care ~~examination~~ or treatment with the patient's  
60 consent.

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

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

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

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

80 6. To the attorney for the health care practitioner or  
81 provider, or to the attorney's staff, for the purpose of  
82 obtaining legal services, whether the attorney is hired directly  
83 by the practitioner or provider or by their insurer.

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

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88           (8) Information disclosed to a health care practitioner by  
89 a patient in the course of the care and treatment of such  
90 patient is confidential and may be disclosed only under the  
91 following circumstances:

92           (a) To other health care practitioners and providers  
93 involved in the care or treatment of the patient.

94           (b) Pursuant to s. 766.106(6)(b)5.

95           (c) As provided for in the authorization for release of  
96 protected health information filed by the patient pursuant to s.  
97 766.1065.

98           (d) If permitted by written authorization from the patient.

99           (e) If compelled by subpoena at a deposition, evidentiary  
100 hearing, or trial for which proper notice has been given.

101           (f) To the attorney for the health care practitioner or  
102 provider, or to the attorney's staff, whether the attorney is  
103 hired directly by the practitioner or provider or by their  
104 insurer.

105           (g) If the health care practitioner or provider is, or  
106 reasonably expects to be, named as a defendant in a medical  
107 negligence action or administrative proceeding ~~Except in a~~  
108 ~~medical negligence action or administrative proceeding when a~~  
109 ~~health care practitioner or provider is or reasonably expects to~~  
110 ~~be named as a defendant, information disclosed to a health care~~  
111 ~~practitioner by a patient in the course of the care and~~  
112 ~~treatment of such patient is confidential and may be disclosed~~  
113 ~~only to other health care practitioners and providers involved~~  
114 ~~in the care or treatment of the patient, or if permitted by~~  
115 ~~written authorization from the patient or compelled by subpoena~~  
116 ~~at a deposition, evidentiary hearing, or trial for which proper~~

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117 ~~notice has been given.~~

118 Section 2. Subsection (4), paragraph (a) of subsection (5),  
119 and subsection (14) of section 766.102, Florida Statutes, are  
120 amended to read:

121 766.102 Medical negligence; standards of recovery; expert  
122 witness.—

123 (4) The Legislature is cognizant of the changing trends and  
124 techniques for the delivery of health care in this state and the  
125 discretion that is inherent in the diagnosis, care, and  
126 treatment of patients by different health care providers. The  
127 failure of a health care provider to order, perform, or  
128 administer supplemental diagnostic tests is ~~shall~~ not be  
129 actionable if the health care provider acted in good faith and  
130 with due regard for the prevailing professional standard of  
131 care. In an action for damages based on death or personal injury  
132 which alleges that such death or injury resulted from the  
133 failure of a health care provider to order, perform, or  
134 administer supplemental diagnostic tests, the claimant has the  
135 burden of proving by clear and convincing evidence that the  
136 alleged action of the health care provider represented a breach  
137 of the prevailing professional standard of care.

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

143 (a) If the health care provider against whom or on whose  
144 behalf the testimony is offered is a specialist, the expert  
145 witness must:

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

152 2. Have devoted professional time during the 3 years  
153 immediately preceding the date of the occurrence that is the  
154 basis for the action to:

155 a. The active clinical practice of, or consulting with  
156 respect to, the same ~~or similar specialty that includes the~~  
157 ~~evaluation, diagnosis, or treatment of the medical condition~~  
158 ~~that is the subject of the claim and have prior experience~~  
159 ~~treating similar patients;~~

160 b. Instruction of students in an accredited health  
161 professional school or accredited residency or clinical research  
162 program in the same ~~or similar specialty; or~~

163 c. A clinical research program that is affiliated with an  
164 accredited health professional school or accredited residency or  
165 clinical research program in the same ~~or similar specialty.~~

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

169 Section 3. Paragraph (b) of subsection (6) of section  
170 766.106, Florida Statutes, is amended to read:

171 766.106 Notice before filing action for medical negligence;  
172 presuit screening period; offers for admission of liability and  
173 for arbitration; informal discovery; review.—

174 (6) INFORMAL DISCOVERY.—

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

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

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

200 3. Physical and mental examinations.—A prospective  
201 defendant may require an injured claimant to appear for  
202 examination by an appropriate health care provider. The  
203 prospective defendant shall give reasonable notice in writing to

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

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

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

224 ~~6.5.~~ Unsworn statements of treating health care providers.—  
225 A prospective defendant or his or her legal representative may  
226 also take unsworn statements of the claimant's treating health  
227 care providers. The statements must be limited to those areas  
228 that are potentially relevant to the claim of personal injury or  
229 wrongful death. Subject to the procedural requirements of  
230 subparagraph 1., a prospective defendant may take unsworn  
231 statements from a claimant's treating physicians. Reasonable  
232 notice and opportunity to be heard must be given to the claimant



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233 or the claimant's legal representative before taking unsworn  
 234 statements. The claimant or claimant's legal representative has  
 235 the right to attend the taking of such unsworn statements.

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

238 766.1065 Authorization for release of protected health  
 239 information.—

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

244  
 245 AUTHORIZATION FOR RELEASE OF  
 246 PROTECTED HEALTH INFORMATION

247  
 248 A. I, (...Name of patient or authorized  
 249 representative...) [hereinafter "Patient"], authorize  
 250 that (...Name of health care provider to whom the  
 251 presuit notice is directed...) and his/her/its  
 252 insurer(s), self-insurer(s), and attorney(s), and the  
 253 designated treating health care provider(s) listed  
 254 below and his/her/its insurer(s), self-insurer(s), and  
 255 attorney(s) may obtain and disclose (within the  
 256 parameters set out below) the protected health  
 257 information described below for the following specific  
 258 purposes:

259 1. Facilitating the investigation and evaluation  
 260 of the medical negligence claim described in the  
 261 accompanying presuit notice; ~~or~~

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262           2. Defending against any litigation arising out  
263 of the medical negligence claim made on the basis of  
264 the accompanying presuit notice; or-

265           3. Obtaining legal advice or representation  
266 arising out of the medical negligence claim described  
267 in the accompanying presuit notice.

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

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

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

286  
287 (List the name and current address of such health care  
288 providers, if applicable.)

289  
290           C. This authorization does not apply to the

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291 following list of health care providers possessing  
292 health care information about the Patient because the  
293 Patient certifies that such health care information is  
294 not potentially relevant to the claim of personal  
295 injury or wrongful death that is the basis of the  
296 accompanying presuit notice.

297  
298 (List the name of each health care provider to whom  
299 this authorization does not apply and the inclusive  
300 dates of examination, evaluation, or treatment to be  
301 withheld from disclosure. If none, specify "none.")  
302

303 D. The persons or class of persons to whom the  
304 Patient authorizes such health information to be  
305 disclosed or by whom such health information is to be  
306 used:

307 1. Any health care provider providing care or  
308 treatment for the Patient.

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

315 3. Any consulting or testifying expert employed  
316 by or on behalf of (name of health care provider to  
317 whom presuit notice was given) and his/her/its  
318 insurer(s), self-insurer(s), or attorney(s) regarding  
319 the matter of the presuit notice accompanying this

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320 authorization.

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

329 5. Any trier of the law or facts relating to any  
330 suit filed seeking damages arising out of the medical  
331 care or treatment of the Patient.

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

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

343 ~~G.F.~~ The Patient understands that, without  
344 exception, the Patient has the right to revoke this  
345 authorization in writing. The Patient further  
346 understands that the consequence of any such  
347 revocation is that the presuit notice under s.  
348 766.106(2), Florida Statutes, is deemed retroactively

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349 void from the date of issuance, and any tolling effect  
 350 that the presuit notice may have had on any applicable  
 351 statute-of-limitations period is retroactively  
 352 rendered void.

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

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

362  
 363 Signature of Patient/Representative: ....

364 Date: ....

365 Name of Patient/Representative: ....

366 Description of Representative's Authority: ....

367 Section 5. Section 766.1091, Florida Statutes, is created  
 368 to read:

369 766.1091 Voluntary binding arbitration; damages.—A health  
 370 care provider licensed pursuant to chapter 458, chapter 459, or  
 371 chapter 466; an entity owned in whole or in part by a health  
 372 care provider licensed pursuant to chapter 458, chapter 459, or  
 373 chapter 466; or a health care clinic licensed pursuant to part X  
 374 of chapter 400 and a patient or prospective patient may agree in  
 375 writing to submit to arbitration any claim for medical  
 376 negligence that may currently exist or accrue in the future  
 377 which would otherwise be brought pursuant to the provisions of

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378 this chapter. An arbitration agreement entered into pursuant to  
379 this section shall be governed by the provisions of chapter 682  
380 and may contain a provision that limits the available damages in  
381 an arbitration award.

382 Section 6. Section 768.0981, Florida Statutes, is amended  
383 to read:

384 768.0981 Limitation on actions against insurers, prepaid  
385 limited health service organizations, health maintenance  
386 organizations, hospitals, or prepaid health clinics.—An entity  
387 licensed or certified under chapter 395, chapter 624, chapter  
388 636, or chapter 641 is ~~shall~~ not be liable for the medical  
389 negligence of a health care provider with whom the licensed or  
390 certified entity has entered into a contract, other than an  
391 employee of such licensed or certified entity, unless the  
392 licensed or certified entity expressly directs or exercises  
393 actual control over the specific conduct that caused injury.

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