A bill to be entitled
An act relating to medical negligence actions;
amending s. 456.057, F.S.; deleting a provision
prohibiting the discussion of a patient’s medical
case; providing circumstance under which patient
records may be released without prior written
authorization; revising conditions under which
confidential patient information acquired in the
course of care or treatment may be disclosed by a
health care practitioner; amending s. 766.102, F.S.;
establishing standard of proof in actions based on the
failure of a health care provider to order, perform,
or administer certain tests; shifting burden of proof
to claimant; revising qualifications to give expert
testimony on the prevailing professional standard of
care; deleting provision regarding limitations of
section; amending s. 766.106, F.S.; providing that a
prospective defendant may conduct an ex parte
interview with a claimant’s treating health care
provider as a tool of informal discovery; amending s.
766.1065, F.S.; revising the form for the
authorization for release of protected health
information; providing for the release of protected
health information to certain treating health care
providers, insurers, and attorneys; authorizing a
treating health care provider, insurer, or attorney to
use protected health information in connection with
legal services relating to a medical negligence claim;
authorizing certain individuals and entities to
conduct ex parte interviews with the claimant’s health

care providers; creating s. 766.1091, F.S.;

authorizing a health care provider or health care

clinic and a patient or prospective patient to agree
to submit a claim of medical negligence to

arbitration; requiring that the arbitration agreement
be governed by ch. 682, F.S.; authorizing the

arbitration agreement to contain a provision that
limits an award of damages; amending s. 768.0981,
F.S.; prescribing limitations on medical negligence
actions against hospitals; providing an effective
date.

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

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

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

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

1. To any person, firm, or corporation that has procured or
furnished such care examination or treatment with the patient’s consent.

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

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

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

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

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

(b) Absent a specific written release or authorization permitting utilization of patient information for solicitation or marketing the sale of goods or services, any use of that information for those purposes is prohibited.
(8) Information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only under the following circumstances:

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

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

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

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

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

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

(g) If the health care practitioner or provider is, or reasonably expects to be, named as a defendant in a medical negligence action or administrative proceeding Except in a medical negligence action or administrative proceeding when a health care practitioner or provider is or reasonably expects to be named as a defendant, information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only to other health care practitioners and providers involved in the care or treatment of the patient, or if permitted by written authorization from the patient or compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given.
notice has been given.

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

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

(4) 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. In an action for damages based on death or personal injury which alleges that such death or injury resulted from the failure of a health care provider to order, perform, or administer supplemental diagnostic tests, the claimant has the burden of proving by clear and convincing evidence that the alleged action of the health care provider represented a breach of the prevailing professional standard of care.

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

(a) If the health care provider 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 health care provider against whom or on whose behalf the testimony is offered; or specialize in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients; and

2. Have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:
   a. The active clinical practice of, or consulting with respect to, the same or similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients;
   b. Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same or similar specialty; or
   c. 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.

(14) 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.

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

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

(6) INFORMAL DISCOVERY.—
(b) Informal discovery may be used by a party to obtain unsworn statements, the production of documents or things, and physical and mental examinations, as follows:

1. Unsworn statements.—Any party may require other parties to appear for the taking of 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 unsworn statement of any party must give reasonable notice 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 to be examined. Unless otherwise impractical, the examination of any party must be done at the same time by all other parties. Any party may be represented by counsel at the taking of an unsworn statement. An unsworn statement may be recorded electronically, stenographically, or on videotape. The taking of unsworn statements is subject to the provisions of the Florida Rules of Civil Procedure and may be terminated for abuses.

2. 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. Medical records shall be produced as provided in s. 766.204.

3. Physical and mental examinations.—A prospective defendant may require an injured claimant to appear for examination by an appropriate health care provider. The prospective defendant shall give reasonable notice in writing to
all parties as to the time and place for examination. Unless otherwise impractical, a 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 claimant’s condition, as it relates to the liability of each prospective 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.

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

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

6. Unsworn statements of treating health care providers.—A prospective defendant or his or her legal representative may also take unsworn statements of the claimant’s treating health care providers. The statements must be limited to those areas that are potentially relevant to the claim of personal injury or wrongful death. Subject to the procedural requirements of subparagraph 1., a prospective defendant may take unsworn statements from a claimant’s treating physicians. Reasonable notice and opportunity to be heard must be given to the claimant.
Section 4. Subsection (3) of section 766.1065, Florida Statutes, is amended to read:

766.1065 Authorization for release of protected health information.—

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

AUTHORIZATION FOR RELEASE OF PROTECTED HEALTH INFORMATION

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

1. Facilitating the investigation and evaluation of the medical negligence claim described in the accompanying presuit notice; or
2. Defending against any litigation arising out of the medical negligence claim made on the basis of the accompanying presuit notice; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Signature of Patient/Representative: ....
Date: ....
Name of Patient/Representative: ....
Description of Representative’s Authority: ....

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

766.1091 Voluntary binding arbitration; damages.—A health
care provider licensed pursuant to chapter 458, chapter 459, or
chapter 466; an entity owned in whole or in part by a health
care provider licensed pursuant to chapter 458, chapter 459, or
chapter 466; or a health care clinic licensed pursuant to part X
of chapter 400 and a patient or prospective patient may agree in
writing to submit to arbitration any claim for medical
negligence that may currently exist or accrue in the future
which would otherwise be brought pursuant to the provisions of
this chapter. An arbitration agreement entered into pursuant to this section shall be governed by the provisions of chapter 682 and may contain a provision that limits the available damages in an arbitration award.

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

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

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