A bill to be entitled

An act relating to medical malpractice; amending s. 456.057, F.S.; allowing use of patient records in a communication and resolution program; creating s. 766.1035, F.S.; creating definitions; creating an optional communication and resolution program; requiring notice; establishing criteria; providing for settlement and compensation; providing that certain documents and communications are confidential; amending s. 766.106, F.S.; providing access to medical information in the medical malpractice presuit process; providing for waiver of the physician-patient privilege; providing for review of records and interviews with treating physicians; repealing provisions for interviews with the claimant's treating physician; repealing notice requirements; making legislative findings; reenacting s. 766.118, F.S.; limiting noneconomic damages in medical negligence actions; creating s. 766.1181, F.S.; providing for the calculation of medical damages; specifying that certain contracts are not subject to discovery or disclosure in certain actions; limiting the amount of damages in certain actions involving liens or subrogation claims by certain payors; providing for severability; providing an effective date.

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

Section 1. Paragraph (d) of subsection (7) of section 456.057, Florida Statutes, is amended to read:

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

(7)

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

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

2. Pursuant to s. 766.1035.

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

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

5.~~4.~~ To the health care practitioner's or provider's attorney during a consultation if the health care practitioner or provider reasonably expects to be deposed, to be called as a witness, or to receive formal or informal discovery requests in

a medical negligence action, presuit investigation of medical negligence, or administrative proceeding.

a. If the medical liability insurer of a health care practitioner or provider described in this subparagraph represents a defendant or prospective defendant in a medical negligence action:

(I) The insurer for the health care practitioner or provider may not contact the health care practitioner or provider to recommend that the health care practitioner or provider seek legal counsel relating to a particular matter.

(II) The insurer may not select an attorney for the practitioner or the provider. However, the insurer may recommend attorneys who do not represent a defendant or prospective defendant in the matter if the practitioner or provider contacts an insurer relating to the practitioner's or provider's potential involvement in the matter.

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

b. The limitations in this subparagraph do not apply if the

attorney reasonably expects the practitioner or provider to be named as a defendant and the practitioner or provider agrees with the attorney's assessment, if the practitioner or provider receives a presuit notice pursuant to chapter 766, or if the practitioner or provider is named as a defendant.

Section 2. Section 766.1035, Florida Statutes, is created to read:

766.1035 Adverse health care incidents.—

(1) DEFINITIONS.—For purposes of this section, the term:

(a) "Adverse health care incident" means an objective and definable outcome arising from or related to affirmative medical intervention by a health care provider that results in a patient's physical injury or death.

(b) "Health care provider" means a hospital, long-term care hospital, or ambulatory surgical center licensed under chapter 395; a hospice or an intermediate care facility for the developmentally disabled licensed under chapter 400; a skilled nursing facility as defined in chapter 408; a birth center licensed under chapter 383; a person licensed under chapter 458, chapter 459, chapter 460, chapter 461, chapter 462, chapter 463, part I of chapter 464, chapter 466, chapter 467, part XIV of chapter 468, or chapter 486; a health maintenance organization certified under part I of chapter 641; a blood bank; a plasma center; an industrial clinic; a renal dialysis facility; or a professional association, partnership, corporation, joint

venture, or other association for professional activity by health care providers.

(c) "Medical services" has the same meaning as provided in s. 636.202.

(d) "Patient" means a person who receives medical care from a health care provider, or if the person is a minor, deceased, or incapacitated, the person's legal representative.

(2) COMMUNICATION AND RESOLUTION PROGRAM.—

(a) A health care provider is encouraged to develop and use a communication and resolution program.

(b) If an adverse health care incident occurs, the health care provider may provide the patient with written notice of the provider's desire to refer the incident to provider's communication and resolution program. Such notice must be sent within 180 days after the date the health care provider knew or should have known of the adverse health care incident. The notice must include:

1. An express offer from the health care provider to resolve the incident through the program.

2. The patient's right to:

a. Receive a copy of medical records related to the incident;

b. Authorize the release of the medical records to a third party; and

c. Seek legal counsel.

3. A statement indicating the time for a patient to bring a lawsuit is limited by s. 95.11 and that referral to the program will not extend such time.

(c) The health care provider offering to refer an adverse health care incident to the program may:

1. Investigate how the adverse health care incident occurred and gather information about medical care, medical services, or treatment provided.

2. Disclose the results of the investigation to the patient.

3. Openly communicate to the patient the steps the health care provider will take to prevent future occurrences of the adverse health care incident.

4. Determine either:

a. That no offer of compensation for the adverse health care incident is warranted and communicate that determination to the patient in writing; or

b. That an offer of compensation for the adverse health care incident is warranted and extend such an offer in writing to the patient, including an acknowledgement that the provider caused the incident.

(d) If the patient agrees to participate, all communications made in the course of the program are privileged and confidential; not subject to discovery, subpoena, or other means of legal compulsion for release; and not admissible as

evidence in a judicial, administrative, or arbitration proceeding.

(3) SETTLEMENT AND PAYMENT.—A health care provider may require the patient, as a condition of an offer of compensation, to execute all documents and obtain any necessary court approval to resolve an adverse health care incident. A patient who has agreed to accept compensation from a health care provider under this section waives the right to bring a medical malpractice action under this chapter against that health care provider related to the adverse medical incident.

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. Interviews of treating health care providers.—It is the policy of the Legislature that there shall be reasonable access to medical information by all parties in the medical malpractice presuit screening process to facilitate the self-executing features of the law. A claimant who initiates the process waives his or her physician-patient privilege with respect to any condition or complaint reasonably related to the injury or illness for which the claimant claims compensation. Notwithstanding the limitations in s. 456.057 and subject to the limitations in s. 381.004, the claimant's medical records, reports, and information relevant to the particular injury or illness for which compensation is sought may be furnished to a treating health care provider upon a prospective defendant's request. A prospective defendant may discuss the claimant's medical condition with each treating health care provider. Any

discussion with a treating health care provider is limited to conditions relating to the claim of medical negligence. Any discussion held or release of information under this sub-paragraph may be held without the knowledge, consent, or presence of any other party. ~~A prospective defendant or his or her legal representative may interview the claimant's treating health care providers consistent with the authorization for release of protected health information. This subparagraph does not require a claimant's treating health care provider to submit to a request for an interview. Notice of the intent to conduct an interview shall be provided to the claimant or the claimant's legal representative, who shall be responsible for arranging a mutually convenient date, time, and location for the interview within 15 days after the request is made. For subsequent interviews, the prospective defendant or his or her representative shall notify the claimant and his or her legal representative at least 72 hours before the subsequent interview. If the claimant's attorney fails to schedule an interview, the prospective defendant or his or her legal representative may attempt to conduct an interview without further notice to 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 or the claimant's legal representative before taking unsworn statements. The claimant or claimant's legal representative has the right to attend the taking of such unsworn statements.

Section 4. The Legislature finds that *Estate of McCall v. United States*, 134 So.3d 894 (Fla. 2014), and *North Broward Hospital District v. Kalitan*, 219 So.3d 49 (Fla. 2017), were decided contrary to legislative intent and existing case law interpreting the equal protection clauses of the state and federal constitutions. The opinions disregard the court's traditional rational basis standard and the Legislature's policymaking role. Under the rational basis test, "[t]he burden is upon the party challenging the statute ... to show that there is no conceivable factual predicate which would rationally support the classification under attack." *Fla. High Sch. Activities Ass'n*, 434 So.2d 306, 308 (Fla. 1983). "[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Commc'ns*, Inc., 508 U.S. 307 (1993). "A State . . . has no obligation to produce evidence to

sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. 312 (1993). The majority opinions in *McCall* and *Kalitan* discard and ignore the Legislature's work and fact-finding leading up to and including the enactment of chapter 2003-416, Laws of Florida. Under s. 3, Art. II and s. 1, Art. III of the State Constitution, it is the Legislature, not the courts, that is entitled to make laws based on policy and facts. It is the Legislature's prerogative to decide whether a medical malpractice crisis exists, whether a medical malpractice crisis has abated, and whether the Florida Statutes should be amended accordingly. The Florida Supreme Court's decision that a crisis no longer exists, if it ever existed, improperly interjected the judiciary into a wholly legislative function. For these reasons, the Legislature finds it appropriate to reenact portions of Chapter 2003-416, Laws of Florida, so that the courts may re-examine the opinions in *McCall* and *Kalitan*.

Section 5. Subsections (2) and (3) of section 766.118, Florida Statutes, are reenacted to read:

766.118 Determination of noneconomic damages.—

(2) LIMITATION ON NONECONOMIC DAMAGES FOR NEGLIGENCE OF PRACTITIONERS.—

(a) With respect to a cause of action for personal injury or wrongful death arising from medical negligence of practitioners, regardless of the number of such practitioner defendants, noneconomic damages shall not exceed $500,000 per

claimant. No practitioner shall be liable for more than $500,000 in noneconomic damages, regardless of the number of claimants.

(b) Notwithstanding paragraph (a), if the negligence resulted in a permanent vegetative state or death, the total noneconomic damages recoverable from all practitioners, regardless of the number of claimants, under this paragraph shall not exceed $1 million. In cases that do not involve death or permanent vegetative state, the patient injured by medical negligence may recover noneconomic damages not to exceed $1 million if:

1. The trial court determines that a manifest injustice would occur unless increased noneconomic damages are awarded, based on a finding that because of the special circumstances of the case, the noneconomic harm sustained by the injured patient was particularly severe; and

2. The trier of fact determines that the defendant's negligence caused a catastrophic injury to the patient.

(c) The total noneconomic damages recoverable by all claimants from all practitioner defendants under this subsection shall not exceed $1 million in the aggregate.

(3) LIMITATION ON NONECONOMIC DAMAGES FOR NEGLIGENCE OF NONPRACTITIONER DEFENDANTS.—

(a) With respect to a cause of action for personal injury or wrongful death arising from medical negligence of nonpractitioners, regardless of the number of such

nonpractitioner defendants, noneconomic damages shall not exceed $750,000 per claimant.

(b) Notwithstanding paragraph (a), if the negligence resulted in a permanent vegetative state or death, the total noneconomic damages recoverable by such claimant from all nonpractitioner defendants under this paragraph shall not exceed $1.5 million. The patient injured by medical negligence of a nonpractitioner defendant may recover noneconomic damages not to exceed $1.5 million if:

1. The trial court determines that a manifest injustice would occur unless increased noneconomic damages are awarded, based on a finding that because of the special circumstances of the case, the noneconomic harm sustained by the injured patient was particularly severe; and

2. The trier of fact determines that the defendant's negligence caused a catastrophic injury to the patient.

(c) Nonpractitioner defendants are subject to the cap on noneconomic damages provided in this subsection regardless of the theory of liability, including vicarious liability.

(d) The total noneconomic damages recoverable by all claimants from all nonpractitioner defendants under this subsection shall not exceed $1.5 million in the aggregate.

Section 6. Section 766.1181, Florida Statutes, is created to read:

766.1181 Damages recoverable for cost of medical or health

care services; evidence of amount of damages; applicability.—

(1) In a personal injury or wrongful death action to which this chapter applies, damages for the cost of medical or health care services provided to a claimant shall be calculated as follows:

(a) If a claimant received and paid a health care provider for medical or health care services, and there is no outstanding balance for those services, the actual amount remitted to the provider is the maximum amount recoverable. Any difference between the amount originally billed by the provider and the actual amount remitted to the provider is not recoverable or admissible in evidence.

(b) If a claimant received medical or health care services that were paid by a government program or private health insurance for which there is no outstanding balance due to the provider other than a copayment or deductible owed by the claimant, the actual amount remitted to the provider by the government program or private health insurance, plus any copayment or deductible owed by the claimant, is the maximum amount recoverable. Any difference between the amount originally billed by the provider and the sum of the actual amount remitted to the provider and the copayment or deductible owed by the claimant is not recoverable or admissible in evidence.

(c) If a health care provider provided medical or health care services to a claimant for which an outstanding balance is

due to the health care provider, and for claims asserted for medical or health care services to be provided to the claimant in the future, the maximum amount recoverable is the amount accepted from Medicare in payment for such services by other health care providers in the same geographic area. This limitation also applies to any lien asserted for such services in the action, with the exception of liens identified in subsection (3).

(2) An individual contract between a health care provider and an authorized insurer offering health insurance, as defined in s. 624.603, or health maintenance organization, as defined in s. 641.19, is not subject to discovery or disclosure in an action under this part, and such information is not admissible in evidence in an action to which this part applies.

(3) Notwithstanding this section, if a Medicaid managed care plan, Medicare, or a payor regulated under the Florida Insurance Code covered or is covering the cost of a claimant's medical or health care services and has given notice of its intent to assert a lien or subrogate a claim for past medical expenses in the action, the amount of the lien or subrogation claim, in addition to the amount of a copayment or deductible paid or payable by the claimant, is the maximum amount recoverable and admissible into evidence with respect to the covered medical or health care services.

(4) This section applies only to those actions for

personal injury or wrongful death to which this chapter applies arising on or after July 1, 2019, and has no other application or effect regarding compensation paid to providers of medical or health care services.

Section 7. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect the remaining provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 8. This act shall take effect July 1, 2019.