

STORAGE NAME: h1205.hcs

DATE: April 4, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
HEALTH CARE SERVICES
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 1205

RELATING TO: Informed Consent to Abortion

SPONSOR(S): Rep. Brooks and others

STATUTE(S) AFFECTED: None

COMPANION BILL(S): SB 746(s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) HEALTH CARE SERVICES

(2)

(3)

(4)

(5)

I. SUMMARY:

Present statute, s. 390.001, F.S., requires a physician to obtain the written informed consent of the pregnant woman before the termination of a pregnancy. In the event of a medical emergency the informed consent provisions may be dispensed with if the physician has obtained at least one corroborative medical opinion attesting to the medical emergency. Violation of this requirement is punishable as a 3rd degree felony.

In addition, s. 390.025, F.S., regulating abortion referral agencies, requires the agency to "furnish a person with a full and detailed explanation of abortion, including the effects and alternatives to abortion," prior to a referral. Violation of this provision is a 1st degree misdemeanor.

This bill:

- ▶ Specifies the components of informed consent including the information that must be provided to the woman, and the opportunity for the woman to view printed material which must include certain information;
- ▶ Requires the information to be provided orally and in person by either the physician who is to perform the abortion or the referring physician;
- ▶ Requires, in the case of a medical emergency, that the physician inform the woman, if possible, of the necessity of the procedure in order to avert her death or substantial impairment of a bodily function;
- ▶ Makes violation of these provisions a "summary offense" for the first offense, and a 2nd degree misdemeanor for any subsequent offenses (unless the physician can demonstrate that furnishing such information would have adversely affected the patient); and
- ▶ Provides civil liability protection for physicians who comply with these informed consent provisions.

No direct fiscal impact is anticipated.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

At common law, a patient has a right to be informed of, and consent to, any medical treatment to his or her person. "Consent" alone occurs when the patient, or one authorized to act on the patient's behalf, agrees to the performance of a medical procedure. It requires no more than the patient understand the nature of the proposed treatment and agree to it. If the physician fails to inform and proceeds with the therapy, he/she is guilty of a battery, and is liable for a non-consensual touching even if no real injury resulted.

By contrast, the "informed consent" doctrine requires the patient be provided with a greater quantity of information to enable them to make an intelligent choice about treatment. In order to provide an adequate basis for informed consent courts have generally held that the following areas must be discussed: the nature of the patient's illness; the nature of the proposed therapy; reasonable alternative therapies; the chance of success with the proposed therapies; substantial risks inherent in the therapies; and the risk of failing to undergo therapy for the illness. These elements of informed consent have been codified in various provisions of Florida Statutes (see e.g., §§ 381.026(4)(b), 393.063(19), 394.455(9), 765.101(8), F.S.).

Failure to provide informed consent is usually subject only to civil, not criminal, liability. A suit for lack of informed consent is generally based on negligence. To succeed, the patient must not only prove that the physician breached a duty to the patient but also that it resulted in injury or damage. This generally requires that the patient prove that he/she would have elected a different course of therapy had he been properly informed.

Florida's "informed consent" doctrine has been codified at s. 766.103, F.S. Under that provision, recovery against a physician is prohibited if the consent was obtained in accordance with the accepted standard of medical practice; a reasonable individual, from the information provided, would have a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures; and the patient would reasonably, under all the surrounding circumstances, have undergone such treatment or procedure had he been so advised. A written consent which meets these requirements raises a rebuttable presumption of a valid consent.

There are several recognized exceptions to the requirement for obtaining the patient's "informed consent." The first applies to emergency situations. A description of and liability protection for practitioners who provide medical care under emergency situations without first obtaining informed consent is provided in §§ 401.455, 768.13 (see also §§ 39.046, 39.407, 39.446, 393.13, 394.459, 415.105, 415.507, 743.064, 916.107, F.S.). In addition, there are several other common law exceptions. The "waiver" exception would apply whenever the patient expresses a desire not to know or to have the physician make the decision for her. The "therapeutic privilege" exception applies to situations where the physician concludes that disclosure may endanger the recovery of the patient and would thus not be in the patient's best interest (see e.g., §§ 381.004(3)(i)4., 458.324, 459.0125, F.S.)

In recent years state legislatures have become involved in mandating, by statute, that informed consent be obtained, and often listing the components of the informed consent with respect to a specific disease, procedure, or category of patient:

- ▶ The most notable example is informed consent to HIV testing (see s. 381.004, F.S.). The components are listed in the statute. Although there is no requirement that consent be provided in writing, or that the physician per se counsel the patient, the procedure must be conducted "in person" both prior to the test and at the time the patient is informed of the test results. No specific penalty for failure to abide by the statute is imposed other than providing grounds for disciplinary action by the physician's licensing board. [See also s. 381.0041 (HIV testing relating to donated human tissue, s. 627.429 (HIV testing for insurance purposes), s. 641.3007 (HIV testing for HMO coverage).]
- ▶ A birth center must obtain written informed consent by clients of the center which "informs the client of the benefits and risks related to childbirth outside a hospital" (s. 383.31, F.S.). In addition clients and their families must be fully informed of the birth center's policies and procedures (s. 383.311, F.S.). Failure to abide by these requirements could result in the imposition of administrative penalties against the birth center (s. 383.33, F.S.).
- ▶ Express and informed consent must be obtained from persons with developmental disabilities, or their guardians, prior to experimental treatment or surgical procedures. Persons who fail to comply are subject to liability for damages (s. 393.13, F.S.).
- ▶ Patients or guardians of persons being admitted for mental health treatment must be provided with certain information prior to admission (s. 394.459, F.S.). Facilities which violate this provision are subject to administrative sanction. [See also s. 394.4598, F.S. (discussing the information a guardian advocate must consider in making an informed decision about mental health treatment).]
- ▶ Nursing home patients must be provided with information about their medical condition and proposed treatment. Facilities which violate these rights are subject to agency sanction (s. 400.022, F.S.).
- ▶ Patients at high risk for breast cancer are required to be informed of treatment alternatives, orally and/or in writing, by their physician (ss. 458.324, 459.0125, F.S.).
- ▶ The components of informed consent to electroconvulsive procedures, and the necessity for obtaining another physician's concurring opinion are provided in s. 458.325, F.S.
- ▶ Midwives are required to inform the client of the qualifications of the licensed midwife, the nature and risk of the procedures to be used by a midwife, and the status of the midwife's malpractice insurance as part of obtaining informed consent to the provision of midwifery services (§§ 467.014, 467.015, 467.016, F.S.). Failure to obtain informed consent could result in disciplinary action.
- ▶ Informed consent must be provided for DNA analysis. Persons who fail to abide by this requirement would be guilty of a 1st degree misdemeanor (s. 760.40, F.S.).
- ▶ Section 916.107, F.S., relating to the rights of forensic clients, require the obtaining of informed consent for mental health treatment. The components of informed consent are provided. Persons who fail to comply are subject to liability for damages. [See also s. 945.48, F.S., relating to mental health treatment of prison inmates.]

Section 390.001, F.S., already requires physicians to obtain the written informed consent of the pregnant woman prior to performing an abortion. A medical emergency exception is provided. A physician who fails to abide by the statute's provisions is guilty

of a third degree felony. [The additional requirement that the husband be provided notice of the proposed termination of pregnancy was found unconstitutional in *Planned Parenthood v. Casey*.] In addition, s. 390.025, F.S., regulating abortion referral agencies, requires the agency to “furnish a person with a full and detailed explanation of abortion, including the effects and alternatives to abortion,” prior to a referral. Violation of this provision is a 1st degree misdemeanor.

B. EFFECT OF PROPOSED CHANGES:

Prior to a termination of pregnancy, either the physician who is to perform an abortion or the referring physician, will be required to provide certain information and printed materials to the pregnant woman.

Physicians who fail to abide by the statute will be guilty of a “summary offense” for the 1st offense, and a 2nd degree misdemeanor for a subsequent offense. Physicians who abide by the statute will be immune from civil liability for failure to obtain informed consent to a termination of pregnancy.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Perhaps. This would most likely come from the physician's practice board.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Physicians will personally be required to provide informed consent to their patients seeking an abortion. In addition they will be required to have printed material on hand to distribute to their patients if the patient wishes to view the information.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

- (2) what is the cost of such responsibility at the new level/agency?

N/A

- (3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?

No.

- c. Does the bill reduce total taxes, both rates and revenues?

No.

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

The requirement that the physician personally provide the information plus supplying the printed materials may increase the costs to the physician or clinic which will be passed to the consumer.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

The bill increases government interference in the physician-patient relationship by specifying the information that must be provided to the patient prior to the performance of an abortion.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. SECTION-BY-SECTION RESEARCH:

Section 1. Creates s. 390.003, F.S., relating to informed consent to abortions to:

- (a) Name the section the "Woman's Right-To-Know Act";
- (b) Prohibit a termination of pregnancy unless voluntary and informed written consent is obtained from the pregnant woman;
- (c) Require a physician to inform the woman about the nature, risks, and alternatives to the procedure, the probable gestational age of the unborn child, and the medical risks associated with carrying the child to term;
- (d) Require the woman to be provided with printed materials, if she wishes to view them, which include a description of the unborn child, a list of agencies that offer alternatives to abortion, and information on the availability of assistance for prenatal, childbirth, and neonatal care;
- (e) Permit an exception from informed consent in the case of a medical emergency under certain conditions;
- (f) Impose a criminal penalty against physicians who fail to obtain informed consent, unless the physician can demonstrate that furnishing the information may have an adverse effect on the patient; and
- (g) Provide a protection from civil liability to a physician who complies with the requirements of this section.

Section 2. Provides an effective date of July 1, 1997.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Requiring the physician to orally and "in-person" inform the woman about the nature and risks of a termination of pregnancy will be time-consuming and costly to physicians. Obtaining and distributing the printed materials may also create an additional expense.

2. Direct Private Sector Benefits:

Women who choose to view the printed materials may be exposed to information that would not normally be considered essential to informed consent to a medical procedure such as abortion (i.e., the availability of medical assistance if they decide to care the pregnancy to term).

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to expend funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Florida does not have criminal category called "summary offense." The most comparable category would probably be a 3rd degree misdemeanor.

Section 390.001(4), F.S., already provides an informed consent procedure prior to the termination of a pregnancy and penalties for violations. The provisions of this bill broaden and conflict with that statute. The better course would be to either repeal that subsection or incorporate this bill into those provisions.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON HEALTH CARE SERVICES:

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