HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 277 Abortions
SPONSOR(S): Health & Human Services Committee; Burgin
TIED BILLS: **IDEN./SIM. BILLS:** SB 290

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Access Subcommittee	10 Y, 5 N	Mathieson	Schoolfield
2) Health & Human Services Committee	12 Y, 6 N, As CS	Mathieson	Gormley

SUMMARY ANALYSIS

The bill amends ch. 390, F.S., relating to the termination of pregnancies. The bill:

- Expands the category of prohibited terminations in Florida, to include those when the fetus has attained viability.
- Changes the phrase "termination of pregnancy" to "abortion" throughout ch. 390, F.S.
- Requires physicians to provide information to a woman regarding the ability of a fetus to feel pain after 20 weeks gestational age, prior to her giving informed consent for an abortion.
- Requires a physician to offer to provide anesthesia or analgesics, if the fetus has attained viability.
- Requires that informed consent be completed 24 hours prior to a procedure.
- Requires all abortion clinics provide conspicuous notice on any advertisements that the clinic is prohibited from performing abortions in the third trimester or after viability and requires the Agency for Health Care Administration (AHCA) to implement a rule to enforce this provision.
- Adds new statutory requirements for all abortion clinics and physicians by requiring 3 hours annual continuing education relating to ethics, requiring a physician to own and operate an abortion clinic, and requiring any abortion performed after viability to be performed in a hospital.
- Transfers the criminal statutory prohibitions found in ss. 797.02 and 797.03, F.S., and conforms them to other changes in the bill.
- Amends current reporting requirements for facilities that perform abortions to conform to standards set by the U.S. Centers for Disease Control.
- Requires AHCA to submit a report, using collected information from abortion clinics or physician's offices performing abortions, to the U.S. Centers for Disease Control, and also report this information to the Governor and other constitutional officers.
- Repeals the penalty for Partial Birth Abortions, in ch. 782, F.S., relating to homicide, that conflicts with the criminal penalty in ch. 390 F.S.
- Provides a severability clause.

The bill has an insignificant fiscal impact on AHCA. See fiscal comments.

The bill provides an effective date of July 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Abortion

In Florida, abortion is defined as the termination of a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.[1] A termination of pregnancy must be performed by a physician[2] licensed under ch. 458, F.S., or ch. 459, F.S., or a physician practicing medicine or osteopathic medicine in the employment of the United States.[3] A person or hospital may object to participation in a termination procedure, without liability for such objection.[4]

In Florida, a termination of pregnancy may not be performed in the third trimester unless there is a medical emergency.[5] Florida law defines the third trimester to mean the weeks of pregnancy after the 24th.[6] Medical emergency is a situation in which:

- To a reasonable degree of medical certainty, the termination of pregnancy is necessary to save the life or preserve the health of the pregnant woman,[7] and is a condition that, on the basis of a physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death, or
- The good faith clinical judgment of the physician, that a delay in the termination of her pregnancy will create serious risk of substantial and irreversible impairment of a major bodily function.[8]

A partial birth abortion is a termination of pregnancy in which the physician performing the termination of pregnancy partially vaginally delivers a living fetus before killing the fetus and completing the delivery.[9] Partial birth abortions are prohibited in the state.[10] There is a statutory exception for such a procedure that is necessary to save the life of a mother who is endangered by a physical disorder, illness or injury, and when no other medical procedure would suffice.[11]

In 2010, DOH reported that there were 214,519 live births in the state of Florida.[12] For the same time period, AHCA reported that there were 79,908 termination procedures performed in the state.[13]

Regulation of Abortion

The Department of Health (DOH) and professional boards regulate healthcare practitioners under ch. 456, F.S. and various individual practice acts.[14] A board is a statutorily created entity that is authorized to exercise regulatory or rulemaking functions within the DOH.[15] Boards are responsible for approving or denying applications for licensure and making disciplinary decisions on whether a practitioner practices within the authority of their practice act. Practice acts refer to the legal authority in state

[1] S. 390.011(1), F.S.
[2] S. 390.0111(2), F.S.
[3] S. 390.011(7), F.S.
[4] S. 390.0111(8), F.S.
[5] S. 390.0111(1), F.S.
[6] S. 390.011(7), F.S.
[7] S. 390.0111(1)(a), F.S.
[8] S. 390.01114(2)(d), F.S.
[9] S. 390.011(6), F.S.
[10] S. 390.0111(5), F.S.
[11] S. 390.0111(5)(c), F.S.
[12] Email from AHCA on file with Health and Human Services Committee staff, November 1, 2011.
[13] *Id.*
[14] S. 456.004, F.S.
[15] S. 456.001, F.S.

statute that grants a profession the authority to provide services to the public. The range of disciplinary actions taken by a board includes citations, suspensions, reprimands, probations, and revocations.

AHCA licenses and regulates abortion clinics in the state, under ch. 390, F.S., and part II of ch. 408, F.S.[16] There are 68 clinics licensed by the state, the majority of which are owned by entities organized as partnerships or corporations.[17] All abortion clinics and physicians performing abortions are subject to the following requirements:

- A termination can only be performed in a validly licensed hospital, abortion clinic, or in a physician's office.[18]
- An abortion clinic must be operated by a person with a valid and current license.[19]
- Any third trimester procedure must only be performed in a hospital.[20]
- No termination shall be performed in the third trimester of pregnancy, unless medically necessary.[21]
- A termination must be performed by a physician as defined in s. 390.011, F.S.[22]
- Proper medical care must be given and used for a fetus for a termination performed during viability.[23]
- Experimentation on a fetus is prohibited.[24]
- Except when there is a medical emergency, a termination may only be performed after a patient has given voluntary and written informed consent.[25] Consent includes verification of the fetal age via ultrasound imaging.[26]
- Fetal remains are to be disposed of in a sanitary and appropriate manner.[27]
- Parental notice must be given 48 hours before performing a termination procedure on a minor,[28] unless waived by a parent or otherwise ordered by a judge.

In addition, pursuant to s. 390.012, F.S., AHCA is directed to prescribe standards for abortion clinics that include:

- Adequate private space for interviewing, counseling, and medical evaluations;
- Dressing rooms for staff and patients;
- Appropriate lavatory areas;
- Areas for preprocedure handwashing;
- Private procedure rooms;
- Adequate lighting and ventilation for procedures;
- Surgical or gynaecological examination tables and other fixed equipment;
- Postprocedure recovery rooms that are equipped to meet the patients' needs;
- Emergency exits to accommodate a stretcher or gurney;
- Areas for cleaning and sterilizing instruments;
- Adequate areas for the secure storage of medical records and necessary equipment and supplies; and
- Conspicuous display of the clinic's license.[29]

Both DOH and AHCA have authority to impose fines or take licensure action against individuals and clinics that are in violation of statutes or rules.[30]

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[16] S. 408.802(3) provides for the applicability of the Health Care Licensing Procedures Act to abortion clinics.
[17] AHCA, Florida Health Finder Report, All Abortion Clinics as of October 31, 2011 (on file with the House Health and Human Services Committee).
[18] S. 797.03 (1), F.S.
[19] S. 797.03 (2), F.S.
[20] S. 797.03(3), F.S. The violation of any of these provisions results in a second degree misdemeanor.
[21] S. 390.0111(1), F.S.
[22] S. 390.0111(2), F.S.
[23] S. 390.0111(4), F.S.
[24] S. 390.0111(6), F.S.
[25] S. 390.0111(3), F.S. A physician violating this provision is subject to disciplinary action.
[26] S. 390.0111(3)(a)1.b., F.S.
[27] S. 390.0111(8), F.S. A person who improperly disposes of fetal remains commits a second degree misdemeanor.
[28] S. 390.01114(3), F.S. A physician who violates this provision is subject to disciplinary action.
[29] S. 390.012(3)(a)1., F.S. Rules related to abortion are found in ch. 59A-9, F.A.C.

Data Collection and Reporting Requirements

Currently facilities that perform terminations are required to submit a monthly report to AHCA containing the following:

- Number of abortions performed,
- Reason for performance,[31] and
- Gestational age of the fetus.[32]

AHCA is required to keep this information in a central location from which statistical data can be drawn.[33] If the abortion is performed in a location other than a medical facility, the physician who performed the abortion is responsible for reporting the information to the agency.[34] The reports are confidential and exempt from public records requirements.[35] Fines may be imposed for violations of the reporting requirements.[36]

The Centers for Disease Control and Prevention (CDC), compiles statistics voluntarily reported by the 50 states, the District of Columbia and New York City, related to termination of pregnancies to produce a national estimate.[37] The last national estimate was completed in 2008.[38] The CDC requests the following information from states in the U.S. Standard Report of Induced Termination of Pregnancy:

- Facility name (clinic or hospital);
- City, town or location;
- County;
- Hospital or clinic's patient identification number (used for querying for missing information without identifying the patient);
- Age;
- Marital status;
- Date of termination;
- Residence of patient;
- Ethnicity;
- Race;
- Education attainment;
- Date of last menses;
- Clinical estimate of gestation;
- Previous pregnancy history;
- Previous abortion history;
- Type of abortion procedure; and
- Name of attending physician and name of person completing report.[39]

The CDC uses this data to provide an annual Abortion Surveillance Report (ASR). The CDC notes that they receive data from some states, but not all.[40] Currently, Florida only reports the annual number of terminations that occur in the state,[41] and is therefore absent from all but three of the charts in the ASR.

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[30] *See* s. 390.018, F.S.

[31] AHCA break terminations in the state out into the following classifications for reason: elective; emotional/psychological health of the mother; incest; physical health of mother that is not life endangering; rape; serious fetal genetic defect, deformity, or abnormality; social or economic reasons; or a life endangering physical condition. See "Reported Induced Terminations of Pregnancy, By Reason, By Weeks of Gestation, Florida Jan-Dec 2010, AHCA. (On file with the Health and Human Services Access Subcommittee, November 1, 2011).

[32] S. 390.0112 (1), F.S.

[33] *Id.*

[34] S. 390.0112(2), F.S.

[35] S. 390.0112(3), F.S.

[36] S. 390.0112(4), F.S.

[37] http://www.cdc.gov/reproductivehealth/Data_Stats/Abortion.htm site accessed January 18, 2012.

[38] http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6015a1.htm?s_cid=ss6015a1_w site accessed January 18, 2012.

[39] Centers for Disease Control, Handbook on the Reporting of Induced Termination of Pregnancy, www.cdc.gov/nchs/data/misc/hb_itop.pdf site accessed January 18, 2012.

[40] The 2008 data set did not include California, Florida, Maryland, New Hampshire, or Wyoming. http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6015a1.htm?s_cid=ss6015a1_w. site accessed January 18, 2012.

[41] www.cdc.gov/nchs/data/misc/hb_itop.pdf site accessed January 18, 2012.

For example, the following chart illustrates reported abortions by known age group and reporting area of occurrence. No information from Florida is presented because the state neither collects, nor reports such data.[42]

TABLE 3. Reported abortions, by known age group and reporting area of occurrence --- selected states,* United States, 2008

State/Area	Age group (yrs)														Total abortions reported by known age	
	<15		15--19		20—24		25--29		30--34		35--39		≥40			
	No.	(%)†	No.	(%)	No.	(%)	No.	(%)	No.	(%)	No.	(%)	No.	(%)	No.	% of all reported abortions
Alabama	105	(0.9)	1,965	(17.4)	3,886	(34.5)	2,818	(25.0)	1,485	(13.2)	793	(7.0)	216	(1.9)	**11,268**	**(100.0)**
Alaska	13	(0.7)	340	(19.4)	583	(33.3)	417	(23.8)	205	(11.7)	140	(8.0)	55	(3.1)	**1,753**	**(99.7)**
Arizona	67	(0.6)	1,772	(17.2)	3,610	(35.0)	2,384	(23.1)	1,311	(12.7)	871	(8.4)	308	(3.0)	**10,323**	**(96.8)**
Arkansas	48	(1.0)	818	(17.1)	1,532	(32.0)	1,136	(23.8)	704	(14.7)	398	(8.3)	145	(3.0)	**4,781**	**(99.9)**
Colorado	58	(0.5)	2,036	(17.6)	3,978	(34.4)	2,612	(22.6)	1,506	(13.0)	1,010	(8.7)	360	(3.1)	**11,560**	**(99.8)**
Connecticut	66	(0.5)	2,576	(18.6)	4,563	(33.0)	3,181	(23.0)	1,914	(13.8)	1,138	(8.2)	389	(2.8)	**13,827**	**(95.7)**
Delaware	35	(0.8)	859	(18.7)	1,556	(33.8)	1,130	(24.5)	557	(12.1)	365	(7.9)	101	(2.2)	**4,603**	**(100.0)**
District of Columbia¶	13	(0.5)	431	(16.9)	767	(30.0)	632	(24.8)	376	(14.7)	239	(9.4)	95	(3.7)	**2,553**	**(100.0)**
Georgia	216	(0.6)	5,208	(14.5)	11,076	(30.9)	9,286	(25.9)	5,642	(15.7)	3,425	(9.5)	1,035	(2.9)	**35,888**	**(100.0)**
Hawaii	25	(0.8)	656	(20.1)	1,073	(32.8)	683	(20.9)	419	(12.8)	291	(8.9)	120	(3.7)	**3,267**	**(99.8)**
Idaho	---**	---	274	(18.5)	511	(34.5)	317	(21.4)	211	(14.2)	118	(8.0)	---	---	**1,481**	**(100.0)**
Illinois††	299	(0.7)	7,378	(17.4)	13,130	(31.0)	10,392	(24.5)	6,245	(14.7)	3,815	(9.0)	1,154	(2.7)	**42,413**	**(99.3)**
Indiana	60	(0.5)	1,734	(15.9)	3,766	(34.4)	2,627	(24.0)	1,558	(14.3)	901	(8.2)	287	(2.6)	**10,933**	**(99.4)**
Iowa	29	(0.4)	1,129	(17.4)	2,259	(34.9)	1,505	(23.2)	801	(12.4)	558	(8.6)	194	(3.0)	**6,475**	**(100.0)**
Kansas	58	(0.5)	1,702	(16.1)	3,682	(34.7)	2,561	(24.2)	1,496	(14.1)	845	(8.0)	260	(2.5)	**10,604**	**(100.0)**
Kentucky	35	(0.8)	685	(16.0)	1,414	(33.1)	1,036	(24.3)	616	(14.4)	355	(8.3)	128	(3.0)	**4,269**	**(99.9)**
Louisiana	60	(0.9)	1,095	(16.3)	2,432	(36.2)	1,675	(25.0)	861	(12.8)	451	(6.7)	139	(2.1)	**6,713**	**(98.5)**
Maine	7	(0.3)	467	(17.8)	921	(35.2)	597	(22.8)	323	(12.3)	238	(9.1)	67	(2.6)	**2,620**	**(99.9)**
Massachusetts	56	(0.2)	3,670	(15.4)	7,934	(33.2)	5,616	(23.5)	3,375	(14.1)	2,274	(9.5)	949	(4.0)	**23,874**	**(100.0)**
Michigan	141	(0.5)	4,752	(18.3)	8,528	(32.8)	5,919	(22.8)	3,714	(14.3)	2,259	(8.7)	652	(2.5)	**25,965**	**(100.0)**
Minnesota	50	(0.4)	1,857	(14.3)	4,308	(33.3)	3,304	(25.5)	1,813	(14.0)	1,152	(8.9)	464	(3.6)	**12,948**	**(100.0)**
Mississippi	23	(0.8)	452	(16.3)	1,002	(36.2)	678	(24.5)	380	(13.7)	179	(6.5)	56	(2.0)	**2,770**	**(99.9)**
Missouri	42	(0.6)	1,165	(15.7)	2,588	(34.9)	1,848	(24.9)	948	(12.8)	602	(8.1)	220	(3.0)	**7,413**	**(100.0)**
Montana	12	(0.6)	395	(18.6)	753	(35.5)	479	(22.6)	271	(12.8)	160	(7.5)	54	(2.5)	**2,124**	**(100.0)**
Nebraska	13	(0.5)	433	(15.4)	973	(34.6)	664	(23.6)	395	(14.0)	248	(8.8)	87	(3.1)	**2,813**	**(100.0)**
Nevada	49	(0.5)	1,619	(15.7)	3,181	(30.8)	2,497	(24.2)	1,616	(15.6)	1,000	(9.7)	376	(3.6)	**10,338**	**(95.8)**
New Jersey	121	(0.4)	4,601	(16.2)	8,782	(30.8)	7,230	(25.4)	4,156	(14.6)	2,557	(9.0)	1,028	(3.6)	**28,475**	**(100.0)**
New Mexico	37	(0.7)	1,014	(19.2)	1,897	(35.8)	1,192	(22.5)	644	(12.2)	363	(6.9)	148	(2.8)	**5,295**	**(98.1)**
New York	640	(0.5)	21,116	(17.0)	37,897	(30.5)	29,910	(24.1)	18,905	(15.2)	11,476	(9.2)	4,360	(3.5)	**124,304**	**(99.5)**
New York City	457	(0.5)	14,276	(16.0)	25,998	(29.2)	21,949	(24.6)	14,459	(16.2)	8,665	(9.7)	3,247	(3.6)	**89,051**	**(99.5)**
New York State	183	(0.5)	6,840	(19.4)	11,899	(33.8)	7,961	(22.6)	4,446	(12.6)	2,811	(8.0)	1,113	(3.2)	**35,253**	**(99.6)**
North Carolina	158	(0.5)	4,818	(15.8)	10,376	(33.9)	7,440	(24.3)	4,408	(14.4)	2,678	(8.8)	696	(2.3)	**30,574**	**(96.1)**
North Dakota	8	(0.6)	250	(18.0)	518	(37.4)	310	(22.4)	155	(11.2)	102	(7.4)	43	(3.1)	**1,386**	**(100.0)**
Ohio	188	(0.6)	5,144	(17.5)	9,945	(33.9)	7,192	(24.5)	3,835	(13.1)	2,245	(7.7)	776	(2.6)	**29,325**	**(99.0)**
Oklahoma	34	(0.5)	1,033	(16.1)	2,215	(34.5)	1,490	(23.2)	887	(13.8)	594	(9.2)	174	(2.7)	**6,427**	**(99.2)**
Oregon	30	(0.3)	1,812	(17.2)	3,213	(30.4)	2,563	(24.3)	1,609	(15.2)	985	(9.3)	349	(3.3)	**10,561**	**(99.5)**
Pennsylvania	236	(0.6)	6,674	(17.2)	13,463	(34.7)	8,987	(23.2)	5,135	(13.2)	3,184	(8.2)	1,122	(2.9)	**38,801**	**(100.0)**
Rhode Island	18	(0.4)	780	(17.3)	1,583	(35.2)	1,044	(23.2)	569	(12.6)	349	(7.8)	159	(3.5)	**4,502**	**(100.0)**
South Carolina	31	(0.4)	1,224	(17.1)	2,352	(32.9)	1,727	(24.1)	994	(13.9)	618	(8.6)	213	(3.0)	**7,159**	**(99.6)**
South Dakota	---	---	137	(16.2)	295	(34.8)	185	(21.8)	131	(15.4)	69	(8.1)	---	---	**848**	**(100.0)**
Tennessee	111	(0.6)	2,858	(15.7)	6,118	(33.6)	4,620	(25.4)	2,540	(14.0)	1,501	(8.2)	449	(2.5)	**18,197**	**(99.7)**
Texas	223	(0.3)	10,177	(12.5)	27,543	(33.9)	21,010	(25.9)	12,210	(15.0)	7,334	(9.0)	2,658	(3.3)	**81,155**	**(99.7)**
Utah	15	(0.4)	621	(16.1)	1,172	(30.5)	971	(25.2)	566	(14.7)	353	(9.2)	150	(3.9)	**3,848**	**(98.4)**
Vermont	---	---	256	(17.2)	546	(36.6)	300	(20.1)	211	(14.2)	122	(8.2)	---	---	**1,491**	**(99.9)**
Virginia	131	(0.5)	3,763	(13.2)	9,341	(32.9)	7,311	(25.7)	4,236	(14.9)	2,663	(9.4)	956	(3.4)	**28,401**	**(99.0)**
Washington	105	(0.4)	4,307	(17.7)	8,009	(33.0)	5,652	(23.3)	3,211	(13.2)	2,173	(8.9)	831	(3.4)	**24,288**	**(100.0)**
West Virginia	7	(0.4)	338	(17.0)	645	(32.5)	495	(25.0)	274	(13.8)	182	(9.2)	42	(2.1)	**1,983**	**(100.0)**
Wisconsin††	39	(0.5)	1,334	(16.7)	2,729	(34.1)	1,894	(23.7)	1,029	(12.8)	712	(8.9)	271	(3.4)	**8,008**	**(100.0)**
Total	**3,721**	**(0.5)**	**117,725**	**(16.2)**	**238,645**	**(32.8)**	**177,517**	**(24.4)**	**104,447**	**(14.3)**	**64,085**	**(8.8)**	**22,464**	**(3.1)**	**728,604**	**(99.3)**
Abortion rate¶¶	**1.2**		**14.3**		**29.6**		**21.6**		**13.7**		**7.8**		**2.7**		**14.0**	
Abortion ratio***	**800**		**338**		**283**		**187**		**140**		**174**		**271**		**218**	

[42] http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6015a1.htm?s_cid=ss6015a1_w site last visited January 18, 2012.

* Data from 47 reporting areas; excludes five areas (California, Florida, Maryland, New Hampshire, and Wyoming) that did not report, did not report by age, or did not meet reporting standards.
† Percentages for the individual component categories might not add to 100 because of rounding.
§ Calculated as the number of abortions reported by known age divided by the sum of abortions reported by known and unknown age.
¶ Because reporting is not mandatory, information could not be obtained for all abortions performed in the District of Columbia.
** Cell details not displayed because of small numbers (N = 1--4).
†† Includes residents only.
§§ Data from hospitals and licensed ambulatory care facilities only; because reporting is not mandatory for private physicians and women's centers, information could not be obtained for all abortions performed in New Jersey.
¶¶ Number of abortions obtained by women in a given age group per 1,000 women in that same age group. Women aged 13--14 years were used as the denominator for the group of women aged <15 years, and women aged 40--44 years were used as the denominator for the group of women aged ≥40 years. Women aged 15--44 years were used as the denominator for the overall rate. For each state, abortions for women of unknown age were distributed according to the distribution of abortions among women of known age for that state.
*** Number of abortions obtained by women in a given age group per 1,000 live births to women in that same age group. For each state, abortions for women of unknown age were distributed according to the distribution of abortions among women of known age for that state.

Informed Consent

As with many medical procedures, a physician must obtain informed consent from a patient prior to termination. In Florida, the requirement for informed consent is provided for in statute, with an exception for medical emergencies. A medical emergency is a situation in which, to "a reasonable degree of medical certainty, the termination of pregnancy is necessary to save the life or preserve the health of the pregnant woman."[43] In a medical emergency, the physician must obtain a corroborating opinion from a second physician that attests to the medical necessity of the procedure, and to the fact to a reasonable degree of medical certainty the mother's life would be harmed by continuation of the pregnancy.[44] Except in the case of such an emergency, consent is considered voluntary and informed, if:

- The physician who is performing the procedure, at a minimum orally informs the patient of the nature and risk of termination;
- The probable gestational age of the fetus is verified by ultrasound imaging. The patient must be offered the opportunity to view the images, with certain exceptions, and hear an explanation of them, and may refuse to view them. If the patient refuses, she must acknowledge the refusal in writing;
- Printed materials prepared by DOH are to be made available to the patient; and
- The patient must acknowledge, in writing, that she received information consistent with these requirements.[45]

A violation of these requirements is grounds for a licensure action against the physician.[46]

Ultrasound

Many states have enacted an ultrasound requirement as an element of informed consent for a woman to terminate her pregnancy.[47] These requirements have been the subject of judicial review in many jurisdictions, and many of these challenges are still in litigation.[48]

[43] S. 390.0111(1)(a), F.S.
[44] S. 390.0111(3)(b), F.S.
[45] *See* s. 390.0111(3), F.S.
[46] S. 390.0111(3)(c), F.S.
[47] *See* Alabama, ALA. CODE s. 26-23A-6 (2011); Arizona, ARIZ. REV. STAT. ANN. s. 36.2156 (2011); Arkansas, ARK. CODE ANN. s. 20-16-602 (2011); Georgia, GA. CODE ANN. s. 31-9A-3 (West 2011); Idaho, IDAHO CODE ANN. s.18.609 (2011); Indiana, IND. CODE s. 16-34-2-1.1 (2011); Kansas, KAN. STAT. ANN. s. 65-6709 (2011); Louisiana, LA. REV. STAT. ANN. s. 40:1299.35.1 (2011); Michigan, MICH. COMP. LAWS ANN. s. 333.17015 (West 2011); Mississippi, MISS. CODE ANN. s. 41-41-34 (2011); Missouri, MO. REV. STAT. s. 188.027 (2011); Nebraska, NEB. REV. STAT. s. 28-327 (2011); North Carolina, 2011 N.C. Sess. Laws 405; North Dakota, N.D. CENT. CODE s. 14.02-1-04 (2011); Ohio, OHIO REV. CODE ANN. s. 2317.561 (West 2011); Oklahoma, OKLA. STAT. tit. 63, s. 1-738.2 (2011); South Carolina, S.C. CODE ANN. s. 44-41-330 (2011); South Dakota, S.D. CODIFIED LAW s. 34-23A-52 (2011); Texas, TEX. HEALTH & SAFETY CODE ANN. s. 171.002 (Vernon 2011); Utah, UTAH CODE ANN. s. 76-7-305 (2011); West Virginia, W. VA. CODE s. 16-2I-2 (2011), Wisconsin, WIS. STAT. s. 253.10 (2011).
[48] In North Carolina, the state has been temporarily enjoined, in an on-going case, from implementing 2011 N.C. Sess. Laws 405, which required a woman to view an ultrasound, *Stuart v. Huff*, 1:11CV804, (D. N.C. 2011). In Oklahoma, an ultrasound requirement has been challenged as unconstitutional, *Nova Health System v. Edmondson*, 2011 WL 1821702, (D. Okla). In Texas, the compulsory sonogram has been held unconstitutional by a federal district court, *Texas Medical Providers Performing Abortion Services v. Lakey*, 2011 WL 3818879. (W.D. Tex., Aug 30, 2011).

In the 2011 session, as a part of the informed consent provisions for a lawful termination of pregnancy, the Florida Legislature enacted a requirement that an ultrasound be conducted on the woman to determine fetal age prior to termination, and that the woman have the opportunity to view the ultrasound, if she so chose.[49]

Fetal Pain

The concept of fetal pain and the capacity of the fetus to recognize pain are the subjects of both ongoing research and significant debate. There are studies that suggest that a fetus may have the physical structures to be capable to feel pain by the gestational age of between 20-24 weeks.[50] This research crystallizes around the connection of nociceptors (the central nervous system's pain messengers) in the extremities of the fetal body to the central nervous system.[51] In support of these claims, researchers have made the following observations:

- That the fetus reacts to noxious stimuli in the womb with what would appear to be a recoil response in an adult or child,[52]
- There is an increase in stress hormones in the fetus in response to noxious stimuli,[53] and
- Fetal anesthesia may be administered to a fetus that is undergoing surgery in the womb, which may result in a decrease in fetal stress hormones.[54]

However, there is also research to suggest that despite the presence of such a physical structure within the fetus, it still lacks the capacity to recognize pain.[55] In a 2005 review of the evidence, the American Medical Association concluded that:

> …pain is an emotional and psychological response that requires conscious recognition of a stimulus. Consequently, the capacity for conscious perception of

[49] SS. 390.0111(3)(a)1.b.(I)-(IV), F.S.

[50] *See*, Laura Myers, Linda Bulich, Philip Hess and Nicole Miller, *Fetal Endoscopic Surgery: Indications and Anaesthetic Management*, 18 BEST PRACTICE & RESEARCH CLINICAL ANAESTHESIOLOGY 231, 241 (June 2004) (first requirement for nociceptors, is the presence of sensory receptors which diffuse throughout the fetus from between 7-14 gestational weeks); K.J.S. Anand and P.R. Hickey, *Pain and its effect in the Human Neonate and Fetus*, 317 NEW ENG. J. MED. 132, 1322 (November, 1987) (Noting that by 20 gestational weeks, sensory receptors have spread to all cutaneous and mucous surfaces of the fetus); Sampsa Vanhatalo and Onno van Nieuwenhuizen, *Fetal Pain?*, 22 BRAIN & DEVELOPMENT 145, 146 (2000) (noting nociceptors have spread across fetal body by 20 gestational weeks).

[51] *See*, Phebe Van Scheltema, Sem Bakker, FPHA Vandenbussche and D Oepkes, *Fetal Pain*, 19 FETAL AND MATERNAL MEDICINE REVIEW 311, 313(2008) (noting that the connection is completed with the cortex by gestational week 24-26); Vivette Glover, *Fetal Pain: Implications for Research and Practice*, BR. J. OBSTET. GYNAECOL. 881, 885 (1999) (noting that activation of the thalamic fibres, and connection to the cortex occurs between 17-20 gestational weeks).

[52] *See*, Ritu Gupta, Mark Kilby and Griselda Cooper, *Fetal Surgery and Anaesthetic Implications*, 8 CONTINUING EDUCATION IN ANAESTHESIA, CRITICAL CARE AND PAIN 71, 74 (2008) (noting that at 22 gestational weeks, the fetus may respond to painful stimuli); Xenophon Giannakoulopoulos and Waldo Sepulveda, *Fetal Plasma Cortisol and Beta-Endorphin Response to Intrauterine Needling*, 344 LANCET 77, (July, 1994) (noting that fetus reacted with body movement with needled in the womb, in a way that it did not when the placenta was needled).

[53] *See*, Kha Tran, *Anaesthesia for Fetal Surgery*, 15 SEMINARS IN FETAL & NEONATAL MEDICINE 40, 44 (2010) (noting that invasive fetal procedures clearly elicit a stress response); Michelle White and Andrew Wolf, *Pain and Stress in the Human Fetus*, 18 BEST PRACTICE & RESEARCH CLINICAL ANAESTHESIOLOGY 205, (June, 2004) (noting that is not known if a fetus can feel pain, but there is a detectable stress response); Myers et al, *supra* note 50, at 242 (noting stress responses from 18 weeks gestation); Giannakoulopoulos et al, *supra* note 52, at 77-81; Gupta et al, *supra* note 52, at 74.

[54] *See*, Gupta et al, *supra* note 52, at 74; Giannakoulopoulos et al, *supra* note 52, at 80; Van Scheltema et al, *supra* note 51, at 320; Tran, *supra* note 53, 44. *But see*, I. Glenn Cohen and Sadath Sayeed, *Fetal Pain, Viability, and the Constitution*, 39 THE JOURNAL OF LAW, MEDICINE AND ETHICS 235, 239-240 (2011) (noting that just because it is not administered during a termination now, does not mean it may not happen in the future).

[55] *See* Stuart Derbyshire, *Foetal Pain*, 24 BEST PRACTICE & RESEARCH CLINICAL OBSTETRICS & GYNAECOLOGY 647, (October, 2010) (noting that the capacity to feel pain requires conceptual subjectivity, which a fetus may not have); Curtis Lowery, Mary Hardman, Nirvana Manning, Barbara Clancy, Whit Hall and K.J.S. Anand, *Neurodevelopmental Changes of Fetal Pain*, 31 SEMINARS IN PERINATOLOGY 275, (October, 2007) (noting the difference between a cortical response to pain, which occurs at 29-30 gestational weeks); Van Scheltema et al, *supra* note 51, 313 (the presence of anatomical structures alone is insufficient to demonstrate a capacity to feel pain).

> pain can only arise after the thalamocortical pathways begin to function, which may occur in the third trimester around 29-30 weeks gestational age."[56]

In a 2010 review of research and recommendations for practice, the Royal College of Obstetricians and Gynaecologists of the United Kingdom, noted the following in relation to fetal awareness:

> Connections from the periphery to the cortex are not intact before 24 weeks of gestation. Most pain neuroscientists believe that the cortex is necessary for pain perception; cortical activation correlates strongly with pain experience and an absence of cortical activity generally indicates an absence of pain experience. The lack of cortical connections before 24 weeks, therefore, implies that pain is not possible until after 24 weeks. Even after 24 weeks, there is continuing development and elaboration of intracortical networks.[57]

Fetal Anesthesia

Fetal anesthesia is administered to the fetus, the mother, or both, when they are undergoing fetal surgery.[58] There are three methods for administering anesthesia during fetal surgery, and the technique used depends upon the type of surgery being performed.[59]

For an open fetal surgery, general anesthesia is provided to the mother, which is then transferred to the fetus through placental passage. The fetus is then given an anesthetic such as fentanyl,[60] intramuscularly[61] to supplement the anesthesia.[62]

For fetoscopic[63] surgery, epidural anesthesia is most commonly utilized.[64] However, in some circumstances it is necessary to supplement the epidural with a balanced inhalation-opioid anesthetic.[65] Each of these techniques have advantages and disadvantages. Epidural anesthesia has the advantage of minimal effects on fetal heart rate, uteroplacental blood flow, and postoperative uterine activity.[66] However, the disadvantages to this technique include a lack of uterine relaxation, lack of fetal anesthesia, and difficulty manipulating the uterus and umbilical cord while the fetus may be moving.[67] Whereas, a balanced inhalation-opioid anesthetic has the advantage of allowing uterine manipulation with an immobile-anesthetized fetus, and this approach should result in reduced fetal cardiovascular depression when compared to deep inhalation anesthesia.[68] The disadvantage of this technique is an inability to fully relax the uterus to access difficult umbilical cord positions.[69]

Deep inhalation anesthesia has the advantage of profound uterine relaxation, while having the disadvantage of fetal cardiovascular depression and decreased uteroplacental blood flow.[70]

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[56] Susan Lee, Henry Ralston, Eleanor Drey, John Partridge and Mark Rosen, *Fetal Pain. A Systematic Multidisciplinary Review of the Evidence,* 294 JAMA 947, 952 (August 2005).
[57] Royal College of Obstetricians and Gynaecologists. *Fetal Awareness: Review of Research and Recommendations for Practice.* London: RCOG Press; 2010, 11.
[58] *Supra* note 54.
[59] *See,* Uwe Schwarz and Jeffrey Glankin, *Anesthesia for Fetal Surgery,* 12 SEMINARS IN PEDIATRIC SURGERY 196, (August, 2003).
[60] Fentanyl citrate is a short-acting narcotic analgesic about 100 times more potent than morphine used as a supplementary analgesic in general anesthesia. *See* Stedmans Medical Dictionary, fentanyl citrate (27th ed. 2000).
[61] Intramuscular is defined as within the substance of a muscle. *See,* Stedmans Medical Dictionary, intramuscular (I.M.) (27th ed. 2000).
[62] *Supra* note 59, at 196-201.
[63] Fetoscopy is the use of a fibreoptic endoscope to see a feuts and the fetal surface of the placenta transabdominally, and also for the collection of fetal blood from the umbilical vein for antenatal diagnosis of fetal disorders. *See,* Stedmans Medical Dictionary, fetoscopy (27th ed. 2000).
[64] *Supra* note 59, at 196-201.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*

Partial-Birth Abortion

Partial-birth abortion entails a procedure during which all of the body of a fetus, but for the head, is extracted from the uterus into the vagina, following which the contents of the skull are extracted from the fetus; thereafter, the dead but otherwise intact fetus is taken from the mother's body. [71] Many jurisdictions, including the federal government,[72] have enacted some form of restriction on partial-birth abortion. These statutes have been subject to judicial review, and have been upheld, subject to other considerations, if they provide a medical exception for the mother's life,[73] or do not impose an undue burden on the woman's right to choose before viability.[74]

In Florida, partial-birth abortion is prohibited by statute in both ch. 390, F.S., [75] and in ch. 782, F.S.,[76] relating to homicide. Each of these prohibitions provide for different criminal penalties for a partial birth abortion.[77] However, the prohibition in ch. 782, F.S., which was called the "Partial-Birth Abortion Act," was the subject of a constitutional challenge in a federal district court in 2000. The case resulted in an injunction against the State, preventing the implementation of the act.[78] The court reasoned that the act was void for vagueness, did not contain a medical emergency exception for the health of the mother and rose to the standard of creating an undue burden on the woman's right to choose to terminate.[79] The state did not appeal this decision.

Continuing Education

Currently, physicians and osteopathic physicians are required to complete 40 hours of continuing education (CE) every 2 years.[80] The appropriate medical licensing boards approve the CE courses.[81]

Certain medical professionals are required to complete continuing education requirements specifically related to ethics:

- Osteopathic physicians-1 hour[82]
- Psychologists-3 hours[83]
- Clinical social workers-3 hours[84]
- Marriage and family therapists-3 hours[85]
- Mental health counselors-3 hours[86]

Currently, physicians are not specifically required to take CE courses related to ethics.[87]

Abortion-Related Crimes

Sections 797.02 and 797.03, F.S., delineate several crimes related to abortion. Section 797.02, F.S., makes it a first degree misdemeanor to advertise, in various ways, any means of "procuring the miscarriage" of a pregnant woman, or any entity or location where such might be obtained.[88]

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[71] *See Stenberg v. Carhart*, 530 U.S. 914, 923-930 (2000).
[72] *See* 18 U.S.C. s. 1531.
[73] *See Planned Parenthood Federation of America v. Ashcroft,* 320 F.Supp.2d. 957 (N.D.Cal. 2004); *Carhart v. Ashcroft,* 331F.Supp.2d. 805 (D.Neb. 2004).
[74] *See Planned Parenthood Federation of America v. Ashcroft,* 330 F.Supp.2d. 436 (S.D.N.Y. 2004).
[75] S. 390.0111(5), F.S.
[76] Ss. 782.30-36, F.S.
[77] S. 390.0111(10), F.S., provides for a felony of the third degree and s. 782.34, F.S., provides for a felony of the second degree.
[78] *A Choice for Women v. Butterworth,* 2000 WL 34402611 (S.D.Fla., June 2, 2000).
[79] *Id* at *3-*5.
[80] s. 456.013, F.S.
[81] Rule 64B15-13.001, F.A.C., and rule 64B8-13.005.
[82] Rule 64B15-13.001, F.A.C.
[83] Rule 64B4-6.001, F.A.C.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] Rule 64B8-13.005, F.A.C.
[88] A first degree misdemeanor is punishable by a fine not exceeding $1,000 or imprisonment not exceeding one year. Ss. 775.082, 775.083, F.S.

Section 797.03, F.S., provides that abortions must be performed only in a validly licensed hospital, abortion clinic or physician's office, except in an emergency care situation. It also provides that a person cannot establish, conduct, manage or operate an abortion clinic without a valid, current license. That section prohibits performing or assisting in an abortion in the third trimester other than in a hospital. Violations of these requirements are second degree misdemeanors.[89]

As noted above, committing a partial-birth abortion is a second degree felony[90] under s. 782.34, F.S., and is a third degree felony[91] under s. 390.0111(10), F.S.

Abortion Caselaw

Federal

In 1973, the foundation of modern abortion jurisprudence, *Roe v. Wade*, was decided by the U.S. Supreme Court.[92] Using strict scrutiny, the court determined that a woman's right to termination is part of a fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[93] Further to this, the court reasoned that state regulation limiting the exercise of this right must be justified by a compelling state interest, and must be narrowly drawn.[94] The court established the trimester framework for the regulation of termination – holding that in the third trimester, a state could prohibit termination to the extent that the woman's life or health was not at risk.[95]

In *Planned Parenthood v. Casey*,[96] the U.S. Supreme Court, whilst upholding the fundamental holding of *Roe,* recognized that medical advancement could shift determinations of fetal viability away from the trimester framework.[97]

One of the significant questions before the court in *Casey* was whether the medical emergency exception to a 24-hour waiting period for a termination was too narrow in that there were some potentially significant health risks that would not be considered "immediate."[98] The exception in question provided that a medical emergency is:

[t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert death or for which delay will create serious risk of substantial and irreversible impairment of a major bodily function[99]

The court determined that the exception would not significantly threaten the life and health of a woman and imposed no undue burden on the woman's right to choose.[100]

Florida

Article I, Section 23 of the Florida Constitution provides an express right to privacy. The Florida Supreme Court has recognized the Florida's constitutional right to privacy "is clearly implicated in a woman's decision whether or not to continue her pregnancy."[101]

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[89] A second degree misdemeanor is punishable by a fine not exceeding $500 or imprisonment not exceeding 60 days. *Id.*
[90] A second degree felony is publishable by a fine not exceeding $10,000 or imprisonment not exceeding 15 years. *Id.*
[91] A third degree felony is punishable by a fine not exceeding $5,000 or imprisonment not exceeding 5 years. *Id.*
[92] 410 U.S. 113 (1973).
[93] *Id.* at 154.
[94] *Id.* at 152-156.
[95] *Id.* at 164-165.
[96] 505 U.S. 833 (1992).
[97] The standard outlined in *Casey* is known as the "undue burden." Which provides that state regulation cannot place a substantial obstacle in the path of a woman's right to choose. *Id.* at 876-879.
[98] *Id.* at 880.
[99] *Id.* at 879.
[100] *Id.* at 880.

In *In re T.W.* the Florida Supreme Court, determined that:

> [p]rior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state. Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother. Insignificant burdens during either period must substantially further important state interests….Under our Florida Constitution, the state's interest becomes compelling upon viability….Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical procedures.[102]

The court recognized that after viability, the state can regulate termination in the interest of the unborn child so long as the mother's health is not in jeopardy.[103]

In *Womancare of Orlando v. Agwunobi,*[104] an almost identical medical emergency exception to that in the *Casey* case was upheld when Florida's parental notification statute was challenged in federal court.[105] Florida's parental notification statute, s. 390.01114, F.S., defines medical emergency as, "a condition that, on the basis of a physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death, or for which a delay in the termination of her pregnancy will create serious risk of substantial and irreversible impairment of a major bodily function."

Freedom of Speech

The First Amendment to the U.S. Constitution protects not only freedom of speech, but also the freedom not to speak.[106] Art. I, s. 4, of the Florida Constitution protects freedom of speech in the state. The U.S. Supreme Court has drawn a distinction between fully protected speech, and commercial speech.[107] A result of this distinction has been to provide a lower level of protection for speech that is categorized as commercial.

Freedom from compulsion to speak in the commercial context has been subject to judicial interpretation.[108] Notably, a federal district court recently enjoined the enforcement of New York City local law that would have required pregnancy services centers to make mandatory disclosures in relation to their services.[109]

Effect of Proposed Changes

Informed Consent

The bill amends the informed consent requirements for any woman who is obtaining an abortion after the fetus has reached 20 weeks gestational age. For such an abortion, the woman must be informed, in

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[101] *See In re T.W.*, 551 So.2d 1186, 1192 (Fla. 1989)(holding that a parental consent statute was unconstitutional because it intrudes on a minor's right to privacy).
[102] *Id.* at 1193-94.
[103] *Id.* at 1194.
[104] 448 F.Supp. 2d 1293, 1301 N.D. Fla. (2005).
[105] One of the underlying issues in the case was whether the parenting notice statute was unconstitutionally vague in that it allegedly failed to give physicians adequate guidance about when the medical emergency provision applies. It was this question for which the court determined that the medical emergency definition was sufficient. The medical emergency provision applies as an exception to obtaining parental notice.
[106] *See West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, (1943).
[107] The Court has defined "commercial speech" as speech that "propose[s] a commercial transaction." *Board of Trustees of State University of New York v. Fox,* 492 U.S. 469, 473 (1989). Fully protected speech is not transformed into commercial speech simply because it is uttered by a corporation, *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), or that the speaker is motivated by a desire for a profit.
[108] For example, see the line of cases that struck down a "checkoff," which was a compulsory marketing assessment for certain agricultural products, and was challenged on the basis of being compelled to speak, even if the producer did not agree with the speech. *See United States v. United Foods,* 533 U.S. 405 (2001); *but see Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005) (Holding that agricultural marketing subsidy was government speech, and thus not subject to the First Amendment).
[109] *See, The Evergreen Association , Inc. v. The City of New York,* 2011 WL 2748728 (S.D.N.Y. July 13, 2011).

person, by the physician who is to perform the abortion, or a referring physician of the ability of the fetus to feel pain. The information must include, but need not be limited to, the following:

- By at least 20 weeks gestational age, a fetus possesses all the anatomical structures, including pain receptors, spinal cord, nerve tracts, thalamus, and cortex, that are necessary in order to feel pain.
- A description of the actual steps in the abortion procedure to be performed or induced, and at which steps the abortion procedure could be painful to the fetus.
- There is evidence that by 20 weeks of gestational age, fetuses seek to evade certain stimuli in a manner that in an infant or adult would be interpreted as a response to pain.
- Anesthesia is given to fetuses who are 20 weeks or more gestational age who undergo prenatal surgery.
- Anesthesia is given to premature children who are 20 weeks or more gestational age who undergo surgery.
- Anesthesia or analgesics are available in order to minimize or alleviate the pain to the fetus.
- The medical risks associated with the use of an anesthetic or analgesic.

Currently, Alaska, Arkansas, Georgia, Indiana, Louisiana, Michigan, Mississippi, South Dakota, Texas and Utah require providers to give women either written or oral information regarding fetal pain to women seeking an abortion.[110]

The bill amends the consent provisions of s. 390.0111(3), F.S., to require that consent be completed at least 24 hours before the procedure. This could require the woman to make two visits for an abortion. The constitutional controversy with informed consent and a waiting period is whether the requirements rise that of an undue burden to a woman's access to an abortion.[111]

Existing law would provide that the medical emergency exception applies to the waiting period, as it does currently for all consent requirements.[112]

Regulation of Abortion

The bill expressly prohibits the performance of an abortion by the instillation method in the state.[113] The bill defines the instillation method as the injection of saline, urea, prostaglandin, or other chemical

[110] *See*, Alaska, ALASKA STAT. s. 18.05.032 (2011); Arkansas, ARK. CODE ANN. s. 20-16-1102 (2011); Georgia, GA. CODE ANN. s. 31-9A-3 (2011); Indiana, IND. CODE s. 16-34-2-1.1 (2011); Louisiana, LA. REV. STAT. ANN. s. 40:1299.36.6 (2011); Michigan, MICH. COMP. LAWS s. 333.17015 (2011); Mississippi, MISS. CODE ANN. s. 41-41-43 (2011); South Dakota, S.D. CODIFIED LAWS s. 34-23A-10.1 (2011); Texas, TEX. HEALTH & SAFETY CODE ANN. s. 171.012 (Vernon, 2011); Utah, UTAH CODE ANN. s. 76-7-305 (2011).

[111] Case law indicates that courts have held that such an imposition may not rise to the standard of an undue burden, even though this would require two visits. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), The Supreme Court upheld a two visit requirement in PA, which included a medical emergency exception. In *Karlin v. Faust*, 188 F. 3d 446, (7th Cir. 1999), the Seventh Circuit upheld a 24 hour waiting period, rejecting the argument that such a requirement would cause increased costs for travel, lodging, child care, loss of confidentiality for women in abusive relationships, or increased delays due to the unavailability of providers. In *Pro-choice Mississippi v. Fordice*, 716 So. 2d 645, (Miss. 1998), the Mississippi Supreme Court upheld a 24 hour waiting period because it served a legitimate state interest in taking measure to allow a woman to make a more informed choice. However, in *Planned Parenthood League of Massachusetts v. Belloti*, 641 F. 2d 1006 (1st Cir. 1981) , the First Circuit rejected the argument that a woman benefited from additional time to reflect, and that this did not rise to the level of a compelling state interest. Courts have held that a waiting period in excess of 24 hours are unconstitutional. *See Leigh v. Olson*, 497 F. Supp. 1340, (D.N.D, 1980); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W. 3d 1, (Tenn. 2000). Many states have enacted informed consent requirements that are specific to abortion, which, in many cases require a waiting period. However, not all of them require two visits. *See* Alabama, ALA. CODE s.26-23A-4 (2011), 24 hours; Arizona, ARIZ. REV. STAT. ANN. s.36.2153 (2011), 24 hours and two visits; Arkansas, ARK. CODE. ANN. s. 20-16-903 (2011), prior day; Connecticut, CONN. GEN. STAT. s19a-116 (2011); Georgia, GA. CODE ANN. s. 31-9A-3 (West 2011), 24 hours; Idaho, IDAHO CODE ANN. s. 18-609 (2011), 24 hours; Indiana, IND. CODE s. 16-34-2-1.1 (2011), 18 hours and two visits; Kansas, KAN. STAT. ANN. s. 65-6709 (2011), 24 hours; Kentucky, KY. REV. STAT. ANN. s. 311.725 (2011), 24 hours; Louisiana, LA. REV. STAT. ANN. s. 40.1299.35.6 (2011), 24 hours and two visits; Michigan, MICH. COMP. LAWS ANN. s. 333.17014 (2011), 24 hours; Minnesota, MINN. STAT. s. 145.2424 (2011), 24 hours; Mississippi, MISS. CODE ANN. s. 41-41-33 (2011), 24 hours and two visits; Missouri, MO. REV. STAT. s. 188.039 (2011), 24 hours and two visits; Nebraska, NEB. REV. STAT. s. 28-327 (2011), 24 hours; North Dakota, N.D. CENT. CODE s. 14.02-1-03 (2011), 24 hours; Ohio, OHIO REV. CODE ANN. s. 2317.56 (2011), 24 hours and two visits; Oklahoma, OKLA STAT. tit. 63 s. 1-738.2 (2011), 24 hours; Pennsylvania, 18 PA. CONS. STAT. s. 3205 (2011), 24 hours; South Dakota, S.D. CODIFIED LAW s. 34-23A-10.1 (2011), 24 hours and two visits; Texas, TEX. HEALTH & SAFETY CODE ANN. s. 171.012 (Vernon 2011), 24 hours and two visits; Utah, UTAH CODE ANN. s. 76-7-305 (2011), 24 hours and two visits; Virginia, VA. CODE ANN. s. 18-2-76 (2011), 24 hours; West Virginia, W. VA. CODE s. 16-2I-2 (2011), 24 hours; Wisconsin, WIS. STAT. s. 253.10 (2011), 24 hours and two visits.

[112] S. 390.0111(3)(b), F.S.

solution into the amniotic sac within the uterine cavity. In the 2008 CDC report of the 45 states that detail the method used, of the 627,923 procedures, 366 used the instillation abortion method.[114]

Third Trimester / Post-Viability

Currently, a physician may not perform an abortion after the third trimester, subject to a medical emergency exception.[115] Section 390.0111(1), F.S., is amended by the bill, providing that an abortion may not be performed after the third trimester, or in the best medical judgment of the physician, the period in which the fetus has attained viability. The bill transfers the definition of viability from s. 390.0111(4), F.S., to the definitions section of ch. 390, F.S., which provides a definition for the entire chapter.

The bill provides an exception to the prohibition on abortion after the third trimester or viability for a medical emergency. The definition of medical emergency is transferred from s. 390.01114(2)(d), F.S., to the definition section of ch. 390, F.S. The bill also transfers the prohibition on abortions being performed outside of a hospital in the third trimester from s. 797.03(1), F.S., to ch. 390, F.S. This prohibition is expanded to include abortions after the fetus has attained viability.

The bill requires that any abortion performed in the third trimester or post-viability, must be completed with two physicians present. The second physician is required to take control of, and provide immediate medical assistance to any infant born alive after an attempted abortion. The second physician would also assume the duty created by the bill to ensure that the fetus is born alive. If a healthcare practitioner, as defined by s. 456.001(4), F.S., [116] has knowledge of a violation of this subsection, there is a duty to disclose the violation to DOH.
The bill requires a physician to offer to administer anesthesia or an analgesic to the fetus prior to performing an abortion at 20 weeks or more gestational age, unless in the case of a medical emergency.[117] The physician is required to document in the patient's medical history file whether the patient has accepted or declined fetal anesthetic or analgesic.

Born Alive

The bill adds a definition for "born alive" to Florida law. The definition provides that born-alive will mean:

> the complete expulsion or extraction from the mother of a human infant, at any stage of development, who, after such expulsion or extraction, breathes or has a beating heart, pulsation of the umbilical cord, or definite and voluntary movement of muscles, regardless of whether the umbilical cord has been cut and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, induced abortion, or other method. It is unclear as to the impact of this definition on the practice of termination.

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[113] An express prohibition on the performance of an instillation abortion was struck down as unconstitutional in Missouri law, in 1976. *See*, *Planned Parenthood v. Danforth*, 428 U.S. 52, 75-79 (1976). However, it should be noted that this was prior to the *Casey* (*supra*, note 83) undue burden standard, and prior to technological innovations that have resulted in new procedures.
[114] Massachusetts reported almost half of the total, with 154 instillation abortions. *See*, http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6015a1.htm?s_cid=ss6015a1_w (site last visited February 23, 2012). Note – this does not include California, Florida, Illinois, Maryland, New Hampshire, Wisconsin, and Wyoming.
[115] S. 390.0111(1), F.S.
[116] S. 456.001(4),F.S., defines a healthcare practitioner as a person regulated under the following chapters: ch. 457, F.S., Acupuncture; ch. 458, F.S., Medicine; ch. 459, F.S., Osteopathic Medicine; ch. 460, F.S., Chiropractic Medicine; ch. 461, F.S., Podiatric Medicine; ch. 462, F.S., Naturopathy; ch. 463, F.S., Optometry; ch. 464, F.S., Nursing; ch. 465, F.S., Pharmacy; ch. 466, F.S., Dentistry, Dental Hygienists and Dental Laboratories; ch. 467, F.S., Midwifery; ch. 468, F.S., part I, Speech-Language Pathology and Audiology; part II, Nursing Home Administration; part III, Occupational Therapy; part V, Respiratory Therapy; part X, Dietetics and Nutrition Practice; part XIII, Athletic Trainers; part XIV, Orthotics, Prosthetics and Pedorthics; ch. 478, F.S., Electrolysis; ch. 480, F.S., Massage Practice; ch. 483, F.S., part III, Clinical Laboratory Personnel; part IV, Medical Physicists; ch. 484, F.S., Dispensing of Optical Devices and Hearing Aids; ch. 486, F.S., Physical Therapy Practice; ch. 490, F.S., Psychological Services; and ch. 491, F.S., Clinical, Counseling and Psychotherapy Services.
[117] S. 390.01114(2)(d), F.S.

The bill creates a new subsection in s. 390.0111, F.S., called "infants born alive." This subsection grants an infant born alive as a result of an attempted abortion the same rights, privileges and powers as a child born alive that is not the result of an attempted abortion. The bill, in s. 390.0111(12)(b), F.S., creates a duty for any healthcare practitioner present when an infant is born alive as a result of an attempted abortion, to:

> exercise the same degree of professional skill, care, and diligence to preserve the life and health of the infant as a reasonably diligent and conscientious health care practitioner would render to an infant born alive in the course of birth that is not subsequent to an attempted abortion.

Partial Birth Abortion

The bill amends the definition of "partial-birth abortion." The amended definition is more specific than current law. Currently, no physician may partially vaginally deliver a living fetus before killing the fetus and completing the delivery.[118] The bill provides a two-part definition:

> (a) Deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
> (b) Performs the overt act, other than completion of delivery, which kills the partially delivered living fetus.

This definition is included in the definition section of ch. 390, F.S., which will control the entire chapter.

The bill amends the medical emergency exception to the partial-birth abortion prohibition, by clarifying the mother's life must be endangered by a physical illness, physical injury, which would include a life-endangering condition that arose from the pregnancy. This standard is different from the definition provided for in the definitions section of ch. 390, F.S.

The bill repeals ss. 782.30-36, F.S., which was known as the "Partial-Birth Abortion Act." This section of law provides a conflicting criminal penalty to that in ch. 390, F.S.

Clinic Regulation

Ownership

The bill provides that an abortion clinic licensed after July 1, 2012, must be wholly owned and operated by one or more physicians who received residency training in dilation-and-curettage and dilation-and-evacuation procedures,[119] or by a professional corporation or limited liability company composed solely of one of more such physicians. A violation of this will be a misdemeanor of the first degree. [120]

Advertising

The bill repeals s. 797.02, F.S., and incorporates the restriction on advertising the provision of an abortion in violation of ch. 390, F.S., into a newly created s. 390.0111(13)(a), F.S. Further, a clinic is required to display on both the premises and in any advertisement, that it does not perform abortions in the third trimester or after viability. The bill amends the delegated authority to AHCA, adding this mandatory disclosure to the required list of rules that the agency must adopt for clinics licensed under ch. 390, F.S.

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[118] S. 390.011(6), F.S.

[119] Dilation-and-curettage is defined as the dilation of the cervix and curettement of the endometrium. Stedmans Medical Dictionary dilation and curettage (D & C) (27th ed. 2000). Essentially, this is the surgical removal of tissue or growth, in the uterus. Dilation-and-evacuation is defined as the dilation of the cervix and removal of the products of conception. Stedmans Medical Dictionary, dilation and evacuation(D & E) (27th ed. 2000).

[120] A first degree misdemeanor is punishable by a fine not exceeding $1,000 or imprisonment not exceeding 1 year. ss. 775.082, 775.083, F.S.

Abortion Related Crimes and Penalties

The bill repeals s. 797.03, F.S., which provides criminal penalties for violations of prohibited acts related to abortion. These provisions are incorporated into ch. 390, F.S., and conforms them to other changes in the bill.

The bill directs DOH to permanently revoke the license of any healthcare practitioner[121] who has been convicted of, is convicted of, or enters a plea of guilty or nolo contendere to, regardless of adjudication, a felony under s. 390.0111, F.S. Licensees would have administrative rights under ch. 120 F.S.

The bill transfers s. 793.02(2), F.S., to the newly created s. 390.014(5), F.S., which provides that an abortion clinic must be licensed by AHCA. The bill provides that a violation of this is to be a misdemeanor of the first degree.

The bill increases the maximum allowable fine under ch. 390, F.S., and part II of ch. 408, F.S., from $1,000 per violation, to $5,000.

Data Collection and Reporting Requirements

The bill requires that the director of any abortion clinic, hospital or physician who undertakes such a procedure to report abortion data each month to the agency, on a form that is consistent with the U.S. Standard Report of Induced Termination of Pregnancy. AHCA is directed to report this information to the CDC. AHCA is further directed to produce an aggregated statistical report of the information reported to the CDC, and provide it to the Governor and constitutional officers of the Legislature before each legislative session. The agency is directed to post the report on its website. The bill delegates rule-making authority to AHCA to implement this section.

Continuing Education

The bill amends s. 456.013(7), F.S., to include a requirement that each physician who performs abortions to complete a board-approved 3-hour ethics CE course, annually. This is to count toward the total CEs that a physician is required by their respective boards to complete each year. In the absence of the board, DOH is required to approve the course.

The bill amends the prohibition of experimentation on a fetus, clarifying that this applies to either dead and alive fetuses.

The bill substitutes the words “termination of pregnancy” for “abortion” throughout ch. 390, F.S.

The bill amends a cross reference in the restrictions on providing consent in the Probate Code, at s. 756.113, F.S.

The bill provides a severability clause.

B. SECTION DIRECTORY:

Section 1: Amends s. 390.011, F.S., relating to Definitions.
Section 2: Amends s. 390.0111, F.S., relating to Termination of Pregnancies.
Section 3: Amends s. 390.01114, F.S., relating to Parental Notice of Abortion Act.
Section 4: Amends s. 390.0112, F.S., relating to Termination of Pregnancies; reporting.
Section 5: Amends s. 390.012, F.S., relating to Powers of Agency; rules; disposal of fetal remains.
Section 6: Amends s. 390.014, F.S., relating to Licenses; fees.
Section 7: Amends s. 390.018, F.S., relating to Administrative Fine.
Section 8: Amends s. 456.013, F.S., relating to Department; general licensing provisions.

[121] *Supra* note 115.

Section 9: Amends s. 765.113, F.S., relating to Restrictions on providing consent.
Section 10: Repeals s. 782.30, F.S., relating to Short title.
Section 11: Repeals s. 782.32, F.S., relating to Definitions.
Section 12: Repeals s. 782.34, F.S., relating to Partial-birth abortion.
Section 13: Repeals s. 782.36, F.S., relating to Exceptions.
Section 14: Repeals s. 797.02, F.S., relating to Advertising, drugs, etc. for abortion.
Section 15: Repeals s. 797.03, F.S., relating to Prohibited acts; penalties.
Section 16: Provides a severability clause.
Section 17: Provides for an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill has an impact on the ownership of new abortion clinics in the state. This bill may present obstacles to existing licensed clinics, in that they may be subject to the physician ownership requirement, despite being grandfathered in, if they attempt to move or consolidate facilities, for example.

D. FISCAL COMMENTS:

AHCA claim that including the CDC requirements will have a fiscal impact on the agency, noting that the agency needs to make changes to their information technology systems to capture and report the additional information, which is expected to cost $50,000.[122] However, AHCA indicate that the agency can absorb this cost within the existing resources of the Health Care Trust Fund, which is in surplus.[123]

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

[122] Agency for Health Care Administration, *House Bill 277Analysis*, on file with the Health and Human Services Committee Staff, (February 25, 2012).
[123] *Id.*

2. Other:

Certain provisions in this bill, including those relating to the modification of the medical emergency exception, may implicate Art. I, Section 23, of the Florida Constitution, which provides for an express right to privacy. While the Florida Supreme Court recognized the State's compelling interest in regulating abortion post-viability in *In re T.W.*, 551 So.2d 1186 (1989), the definition of medical emergency applied to third trimester and post-viability procedures in this bill does not appear to have been judicially reviewed in this context.

B. RULE-MAKING AUTHORITY:

The bill requires the relevant boards and DOH to adopt rules to implement the provisions of s. 390.0111, F.S. The bill delegates rulemaking authority to AHCA to implement the reporting requirements contained in the bill, and require clinics to disclose that they do not undertake procedures in the third trimester or post viability. The bill provides sufficient rule-making authority to DOH and AHCA to implement its provisions.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 23, 2012, the Health and Human Services Committee adopted an amendment to HB 277. The amendment:

- Added a requirement to the informed consent law for abortion procedures after the fetus has reached 20 weeks gestational age – the physician must inform the woman of several specified points related to fetal pain.
- Requires a physician to offer to administer anesthesia or an analgesic to the fetus prior to performing an abortion at is 22 weeks or more gestational age, unless in the case of a medical emergency.
- Expressly prohibited the performance of an instillation abortion.

The bill was reported favorable as a Committee Substitute. The analysis reflects the Committee Substitute.