

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 1287 Reproductive Medicine
SPONSOR(S): Health Quality Subcommittee, Jenne and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 698

FINAL HOUSE FLOOR ACTION: 117 Y's 0 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/HB 1287 passed the House on March 10, 2020, as CS/CS/SB 698, as amended. The Senate concurred in the House amendment to the Senate bill and subsequently passed the bill as amended on March 12, 2020. The bill contains a portion of CS/HB 1289.

Informed consent is a process in which a health care provider educates a patient about the risks, benefits, and alternatives of a given procedure or intervention. Such information enables a patient to make a competent decision about whether to undergo a procedure or treatment. The bill prohibits a health care practitioner, a medical student, or any other student receiving health care practitioner training from performing a pelvic examination on a patient without express written consent with, certain exceptions.

Infertility is the inability to conceive a child, and generally, a person is considered to be infertile after one year of unsuccessful conception. A physician may treat infertility by using intrauterine insemination or assistive reproductive technology. In intrauterine insemination, the physician uses reproductive material from the woman's partner or a donor. In assistive reproductive technology, an egg is fertilized in a laboratory using reproductive material from the woman's partner or a donor.

The bill also prohibits a health care practitioner from intentionally implanting, or causing to be implanted, a human embryo without the recipient's consent to the use of that human embryo, or inseminating a patient, or causing a patient to be inseminated, with human reproductive material from a donor without the patient's consent to the use of that donor's reproductive material. The bill bans a physician from intentionally implanting a patient, or causing a patient to be implanted, with a human embryo created using the physician's reproductive material, or inseminating a patient, or causing a patient to be inseminated, with the human reproductive material of the physician. The bill establishes such action as a ground for disciplinary action against the health practitioner's or physician's license.

Effective October 1, 2020, the bill creates the crime of reproductive battery, which makes it a third degree felony for a healthcare practitioner to intentionally implant a human embryo or transfer into a recipient the reproductive material of a donor if the patient has not consented to the use of that human embryo or the reproductive material from that donor. It is a second degree felony if the health care practitioner uses his or her own reproductive material. The bill tolls the statute of limitations for criminal prosecution of a reproductive battery until the date a violation is discovered and reported to law enforcement or another governmental agency. The bill requires the Department of Health (DOH) to issue an emergency order suspending the license of a health care practitioner who pleads guilty to or is convicted of reproductive battery.

The bill will likely have a positive insignificant impact on prisons, and an insignificant, negative fiscal impact on DOH. The bill has no fiscal impact on local governments.

The bill was approved by the Governor on June 18, 2020, ch. 2020-31, L.O.F., and will become effective on July 1, 2020, except as otherwise provided.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Present Situation

Physician Licensure in Florida

Florida licenses two types of physicians: allopathic and osteopathic. Allopathic physicians diagnose, treat, operate, or prescribe for any human disease, pain, injury, deformity, or other physical or mental condition.¹ The scope of practice for osteopathic physicians is the same as that of allopathic physicians; however, osteopathic medicine emphasizes the importance of the musculoskeletal structure and manipulative therapy in the maintenance and restoration of health.²

The Boards of Medicine and the Boards of Osteopathic Medicine (collectively “boards”) regulates allopathic and osteopathic physicians, under ch. 458, F.S., and ch. 459, F.S., respectively. The boards may discipline a physician’s license if the physician violates standards of practices, the applicable practice act, or the general health care practitioner licensing statute, ch. 456, F.S. Depending on the violation, the boards may:³

- Refuse to certify, or to certify with restrictions, an application for a license;
- Suspend or permanently revoke a license;
- Place a restriction on the licensee’s practice or license;
- Impose an administrative fine not to exceed \$10,000 for each count or separate offense; if the violation is for fraud or making a false representation, a fine of \$10,000 must be imposed for each count or separate offense;
- Issue a reprimand or letter of concern;
- Place the licensee on probation;
- Require a corrective action plan;
- Refund fees billed and collected from the patient or third party on behalf of the patient; or
- Require the licensee to undergo remedial education.

A board must consider what is necessary to protect the public or to compensate the patient when it decides the penalty to impose.⁴

Informed Consent

Informed consent for medical treatment is fundamental in both ethics and law.⁵ Informed consent is a process in which a health care provider educates a patient about the risks, benefits, and alternatives of a given procedure or intervention.⁶ A patient must be competent to make a voluntary decision about whether to undergo a procedure. Foregoing the process of consent within medicine can result in violations of both autonomy and basic rights, as well as trust.⁷

¹ Section 458.305, F.S.

² Section 459.003, F.S.

³ Sections 458.331(2), and 459.015(2), F.S.

⁴ Id.

⁵ American Medical Association, *Informed Consent: Code of Medical Ethics Opinion 2.1.1*, available at <https://www.ama-assn.org/delivering-care/ethics/informed-consent> (last visited January 31, 2020).

⁶ William Gossman, Imani Thornton, John Hipskind, *Informed Consent*, (July 2019), available at <https://www.ncbi.nlm.nih.gov/books/NBK430827/> (last visited January 31, 2020).

⁷ Phoebe Friesen, *Educational Pelvic Exams on Anesthetized Women: Why Consent Matters (Abstract)*, 32 *BIOETHICS* 298 (June 2018), available at <https://onlinelibrary.wiley.com/doi/abs/10.1111/bioe.12441> (last visited January 31, 2020).

The idea of informed consent was established in 1914, in a case in which a patient was operated on without her consent.⁸ In determining whether she had a cause of action against the hospital in which the operation was formed, Judge Cardozo opined that “every human being of adult years and sound mind has a right to determine what shall be done to his own body; and a surgeon who performs an operation without his patient’s consent commits an assault, for which he is liable for damages.”⁹

Florida Requirements for Informed Consent

Florida law does not contain a general statute on informed consent. However, a board rule requires physicians to explain the medical or surgical procedure to be performed to the patient and obtain the informed consent of the patient.¹⁰ The rule does not require physician to obtain or witness the signature of the patient on a written form evidencing informed consent.

Pelvic Examinations

A pelvic examination involves the visual examination of the external genitalia and an internal visual examination of the vaginal walls and cervix using a speculum and palpation of the pelvic organs.¹¹ Health care practitioners often perform pelvic examinations as a part of the annual well woman visit.¹² A health care practitioner may also perform a pelvic examination to diagnose specific health conditions, such as cancer and bacterial vaginosis.¹³

Benefits of routine pelvic examinations include early detection of treatable gynecologic conditions before symptoms occur and incidental findings such as dermatologic changes and foreign bodies.¹⁴ These examinations also give the health care practitioner an opportunity to establish open communication with the patient to answer specific questions and reassure her of normalcy.¹⁵

New clinical guidelines have recommended against pelvic examinations on asymptomatic, non-pregnant, adult women.¹⁶ Routine pelvic examination has not been shown to benefit such women in that it rarely detects important disease and does not reduce mortality.¹⁷ Several harms have been identified for the performance of pelvic examinations including fear, anxiety, embarrassment, pain, and discomfort.¹⁸ Physical harms include urinary tract infections and symptoms such as dysuria and frequent urination.¹⁹

The American College of Obstetricians and Gynecologists finds that data is currently insufficient to make a recommendation for or against routine pelvic examinations. Therefore, it recommends that

⁸ *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914).

⁹ *Id.*

¹⁰ Rule 64B8-9.007, F.A.C.

¹¹ *Id.* A pelvic examination usually involves an examination of woman’s vulva, vagina, uterus, ovaries, and fallopian tubes. It may also include examination of the bladder and the rectum. Melissa Conrad Stoppler, MD, *Pelvic Exam*, MedicineNet, available at https://www.medicinenet.com/pelvic_exam/article.htm#why_is_a_pelvic_exam_performed (last visited January 31, 2020).

¹² Amir Qaseem, et al., *Screening Pelvic Examination in Adult Women: A Clinical Practice Guideline from the American College of Physicians*, 161 *Ann Intern Med* 67 (2014), available at [https://annals.org/aim/fullarticle/1884537/screening-pelvic-examination-adult-women-clinical-practice-guideline-from-american? ga=2.7498674.1663533724.1580510917-1215329083.1580510917](https://annals.org/aim/fullarticle/1884537/screening-pelvic-examination-adult-women-clinical-practice-guideline-from-american?ga=2.7498674.1663533724.1580510917-1215329083.1580510917) (last visited January 31, 2020).

¹³ *Id.*

¹⁴ American College of Obstetricians and Gynecologists, Committee on Gynecologic Practice, *ACOG Committee Opinion, Number 754*, 132(4) *OBSTETRICS & GYNECOLOGY* 174 (Oct. 2018), available at <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Gynecologic-Practice/The-Utility-of-and-Indications-for-Routine-Pelvic-Examination?IsMobileSet=false> (last visited January 31, 2020).

¹⁵ *Id.*

¹⁶ *Supra* note 12. This recommendation does not apply to pap smears.

¹⁷ American College of Physicians, *American College of Physicians Recommends Against Screening Pelvic Examinations in Adult, Asymptomatic, Average Risk, Non-Pregnant Women*, (July 1, 2014), available at <https://www.acponline.org/acp-newsroom/american-college-of-physicians-recommends-against-screening-pelvic-examination-in-adult-asymptomatic> (last visited on January 31, 2020).

¹⁸ *Id.*

¹⁹ *Id.*

pelvic examinations be performed when indicated by medical history or symptoms, such as abnormal bleeding, pelvic pain, or urinary issues.²⁰

Pelvic Examinations on Unconscious or Anesthetized Patients

In recent years, articles have detailed reports of medical students performing pelvic examinations, without consent, on women who are anesthetized or unconscious.²¹ This practice has been common since the late 1800's and, in 2003, a study reported that 90 percent of medical students who completed obstetrics and gynecology rotations at four Philadelphia-area hospitals performed pelvic examinations on anesthetized patients for educational purposes.²²

Some medical organizations have advised their members that pelvic examinations should not be performed on anesthetized or incapacitated patients without discussing the procedure with the patient or obtaining the patient's consent. The Committee on Ethics of the American College of Obstetricians and Gynecologists resolved that "pelvic examinations on an anesthetized woman that offer her no personal benefit and are performed solely for teaching purposes should be performed only with her specific informed consent obtained before her surgery".²³

The American Medical Association Council on Ethical and Judicial Affairs takes a softer position. It recommends that "patients should be informed of the identity and training status of individuals involved in their care ... patients are free to choose from whom they receive treatment." In situations where the patient will be temporarily incapacitated (e.g., anesthetized) and where student involvement is anticipated, "involvement should be discussed before the procedure is undertaken whenever possible ... in instances where a patient may not have capacity to make decisions, student involvement should be discussed with the surrogate decision-maker..."²⁴

The Association of American Medical Colleges (AAMC) offered that "performing pelvic examinations on women under anesthesia, without their knowledge or approval ... is unethical and unacceptable".²⁵ However, the chief health care officer for the AAMC notes that recent articles on unauthorized pelvic examinations rely on studies from more than 10 years ago and before more detailed informed consent forms were used.²⁶ The AAMC claims that students and residents typically practice pelvic examinations with special mannequins and standardized patients who are specifically trained for this purpose.²⁷

²⁰ Id.

²¹ For examples, see: Paul Hsieh, *Pelvic Exams on Anesthetized Women Without Consent: A Troubling and Outdated Practice*, FORBES (May 14, 2018), available at <https://www.forbes.com/sites/paulhsieh/2018/05/14/pelvic-exams-on-anesthetized-women-without-consent-a-troubling-and-outdated-practice/#74d152df7846> (last visited January 31, 2020); Dr. Jennifer Tsai, *Medical Students Regularly Practice Pelvic Exams on Unconscious Patients. Should They?*, ELLE (June 24, 2019), available at <https://www.elle.com/life-love/a28125604/nonconsensual-pelvic-exams-teaching-hospitals/> (last visited January 31, 2020); Lorelei Laird, *Pelvic Exams Performed without Patients' Permission Spur New Legislation*, ABA JOURNAL (Sept. 2019), available at <http://www.abajournal.com/magazine/article/examined-while-unconscious> (last visited January 31, 2020); and Amanda Eisenberg, *New Bills Would Ban Pelvic Exams without Consent*, POLITICO (March 14, 2019), available at <https://www.politico.com/states/new-york/albany/story/2019/03/13/new-bills-would-ban-pelvic-exams-without-consent-910976> (last visited January 31, 2020).

²² John Duncan, Dan Luginbill, Matthew Richardson, Robin Fretwell Wilson, *Using Tort Law to Secure Patient Dignity: Often Used as Teaching Tools for Medical Students, Unauthorized Pelvic Exams Erode Patient Rights, Litigation Can Reinstate Them*, 40 TRIAL 42 (Oct. 2004).

²³ American College of Obstetricians and Gynecologists, Committee on Ethics, *Professional Responsibilities in Obstetric-Gynecologic Medical Education and Training*, (Aug. 2011), available at <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Ethics/Professional-Responsibilities-in-Obstetric-Gynecologic-Medical-Education-and-Training?IsMobileSet=false> (last visited January 31, 2020).

²⁴ AMA Council on Ethical and Judicial Affairs, *Medical Student Involvement in Patient Care: Report of the Council on Ethical and Judicial Affairs*, AMA Journal of Ethics (Mar. 2001), available at <https://journalofethics.ama-assn.org/article/medical-student-involvement-patient-care-report-council-ethical-and-judicial-affairs/2001-03> (last visited January 31, 2020).

²⁵ Robin Fretwell Wilson, *Autonomy Suspended: Using Female Patients to Teach Intimate Exams Without Their Knowledge or Consent*, 8 J OF HEALTH CARE LAW AND POLICY 240, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=880120 (last visited January 31, 2020).

²⁶ Id.

²⁷ Id.

California, Hawaii, Illinois, Iowa, Maryland, Oregon, Utah, and Virginia prohibit unauthorized pelvic examinations.²⁸

Infertility

Infertility is the inability to conceive a child, and generally, a person is considered to be infertile after one year of unsuccessful conception.²⁹ The Centers for Disease Control (CDC) estimates about 12 percent of women aged 15 to 44 years in the United States have difficulty getting pregnant or carry a pregnancy to term.³⁰ Infertility affects both men and women equally. In approximately forty percent of infertile couples, the male partner is either the sole cause or a contributing cause of infertility.³¹

Treatment of Infertility

Health care practitioners may treat infertility using a number of methods: medicine, surgery, intrauterine insemination, or assisted reproductive technology.³² Health care practitioners often use more than one of these methods concurrently. The treatment used by the health care practitioner depends on the:³³

- Factors contributing to the infertility.
- Duration of the infertility.
- Age of the female.
- Couple's treatment preference after counseling about success rates, risks, and benefits of each treatment option.

Eighty-five to ninety percent of infertility cases are treated with medication or surgery.³⁴ A health care practitioner may use intrauterine insemination (IUI), also known as artificial insemination, if medication or surgery is not indicated or is unsuccessful in resolving the infertility. With IUI, specially prepared sperm are inserted into a woman's uterus.³⁵ The sperm may be the sperm of her partner or from a donor.

Assistive reproductive technology (ART) includes all fertility treatments in which both the eggs and the embryos are handled outside of the body. Examples of ART includes in vitro fertilization (IVF), gamete intrafallopian transfer, pronuclear stage tubal transfer, tubal embryo transfer, and zygote intrafallopian transfer.³⁶

IVF involves surgically removing eggs from a woman's ovaries and combining them with her partner's sperm or donor sperm in a laboratory.³⁷ After 40 hours the eggs are examined to see if they have become fertilized by sperm and are dividing into cells. The fertilized eggs or embryos are then placed in the woman's uterus.³⁸ The transfer may occur at the time they are fertilized or the embryos may be cryopreserved for future use.

²⁸ Lorelei Laird, *Pelvic Exams Performed without Patients' Permission Spur New Legislation*, ABA JOURNAL (Sept 2019), available at <http://www.abajournal.com/magazine/article/examined-while-unconscious> (last visited January 31, 2020).

²⁹ Centers for Disease Control and Prevention, *Infertility FAQs*, available at <https://www.cdc.gov/reproductivehealth/infertility/index.htm> (last visited January 25, 2020).

³⁰ Id.

³¹ American Society for Reproductive Medicine, *Quick Facts about Infertility*, available at <https://www.reproductivefacts.org/faqs/quick-facts-about-infertility/> (last visited February 1, 2020).

³² *Supra* note 29.

³³ Id.

³⁴ *Supra* note 31.

³⁵ *Supra* note 29.

³⁶ American Society for Reproductive Medicine, *Assisted Reproductive Technologies*, available at <https://www.reproductivefacts.org/topics/topics-index/assisted-reproductive-technologies/> (last visited February 1, 2020).

³⁷ American Society for Reproductive Medicine, *What is In Vitro Fertilization?*, available at <https://www.reproductivefacts.org/faqs/frequently-asked-questions-about-infertility/q05-what-is-in-vitro-fertilization/> (last visited February 1, 2020).

³⁸ Id.

Fraudulent Insemination

With the rising popularity of at-home genetic testing, adult children are learning that they are not biologically related to their fathers and that they may have multiple half-siblings. Beginning in 2016, cases began to emerge in which male physicians had used their own sperm in the 1970s through the 1990s to inseminate patients without their knowledge.³⁹

When infertility treatment was relatively new, physicians would mix a spouse's sample with that of a donor, and physicians typically provided little information about the donor to the patient.⁴⁰ A survey conducted by the federal Office of Technology Assessment in 1987, revealed that approximately two percent of fertility doctors who responded had use their own sperm to inseminate patients.⁴¹ Physicians have justified this practice by indicating that the donors were advised that the sperm donors were anonymous and would not provide any other information to protect that anonymity.⁴² Unlike the practice in 1970s and 1980s, many donations today are provided to sperm banks, rather than directly to practitioners, that typically catalog donations, along with profiles of the donors.⁴³

Former patients impacted by fraudulent insemination feel physically violated and assaulted, and may feel guilty or remorseful for seeking accountability due to their affection for their children.⁴⁴ Children who resulted from fraudulent insemination may experience disruption in personal identity and may become estranged from their families if they pursue relationships with their newly found half-siblings.⁴⁵

Criminal Liability

Current law presents several obstacles to imposing criminal sanctions for fraudulent insemination. As of 2019, no health care practitioner has been held criminally liable for conduct relating to the unauthorized use of human reproductive material.⁴⁶ Instead, prosecuting authorities have charged health care practitioners with mail fraud, wire fraud, perjury, and obstruction of justice when state laws have failed to specifically provide criminal penalties for such conduct.⁴⁷

Florida

Florida law does not specifically prohibit a health care practitioner from implanting an embryo created with, or inseminating a patient with, human reproductive material from an unspecified donor without the patient's consent. The elements of some existing crimes come close to capturing the conduct, but present challenges when applied in a health care setting. For example, it is unlikely that the crime of battery⁴⁸ captures fraudulent insemination. A person commits battery when he or she:⁴⁹

- Actually and intentionally touches or strikes another person against the will of the other; or

³⁹ Dr. Jody Lynee Madeira, *Uncommon Misconceptions: Holding Physicians Accountable for Fertility Fraud*, 37 LAW & INEQUALITY 45 (Winter 2019), available at <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1605&context=lawineq> (last visited February 1, 2020).

⁴⁰ Dov Fox, JD, DPhil, I. Glenn Cohen, JD, and Eli Y. Adashi, MD, MS, *Fertility Fraud, Legal Firsts, and Medical Ethics (Abstract)*, 134 *Obstetrics & Gynecology* 918 (Nov. 2019), available at https://journals.lww.com/greenjournal/Citation/2019/11000/Fertility_Fraud,_Legal_Firsts,_and_Medical_Ethics.4.aspx (last visited February 1, 2020).

⁴¹ *Supra* note 39.

⁴² Michael Cook, *Another Case of Fertility Fraud, This Time in Colorado*, BIOEDGE, (Feb. 1, 2020), available at <https://www.bioedge.org/bioethics/another-case-of-fertility-fraud-this-time-in-colorado/13311> (last visited February 1, 2020).

⁴³ *Supra* note 40.

⁴⁴ *Supra* note 39.

⁴⁵ *Id.*

⁴⁶ *Supra* note 39.

⁴⁷ Jody Lynee Madeira, *Understanding Illicit Insemination and Fertility Fraud, From Patient Experience to Legal Reform*, (Jan. 29, 2020) <https://journals.library.columbia.edu/index.php/cjgl/article/view/4559> (last visited Feb. 1, 2020).

⁴⁸ Section 784.03, F.S.

⁴⁹ Battery is a first degree misdemeanor, punishable by up to one year in county jail and a fine up to \$1,000. Sections 775.082 and 775.083, F.S.

- Intentionally causes another person bodily harm.

A fertility patient consents to an insemination procedure prior to sperm being injected. Even if a fertility patient would not have consented to the sperm's source, because she consents to the actual "touching" required for a battery, it may be difficult to prove a violation. Moreover, other states have resisted applying battery statutes to fraudulent insemination out of concern that a jury may determine that a patient consented to conduct in cases where anonymous donor sperm is used for insemination.⁵⁰

Similarly, the elements of fraudulent insemination are likely not captured by the existing crime of sexual battery. Sexual battery is the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object.⁵¹ Sexual battery does not include an act done for a bona fide medical purpose.⁵² Although sexual battery does not require proof that the act was performed for the purpose of sexual gratification, the fact that the act is performed in a clinical setting in which the patient has consented to the procedure may present obstacles to proving a violation.⁵³

Other States

Texas prohibits a person from using genetic material without disclosing the source of such material as a form of sexual assault. Under the law, it is a felony to implant human reproductive material without a patient's consent, and a violation is punishable by six months to two years imprisonment and a fine up to \$10,000.⁵⁴ Indiana prohibits making a misrepresentation involving human reproductive material or a medical procedure, device, or drug. A violation of the prohibition is punishable by one to six years imprisonment and a fine up to \$10,000.⁵⁵ Currently, Texas and Indiana are the only states that have criminalized conduct related to fraudulent insemination.⁵⁶

California law makes it a crime for a person to knowingly use reproductive material in ART, for any purpose other than that authorized by the provider of the reproductive material.⁵⁷ It also prohibits anyone from knowingly implanting reproductive material, through ART, into a recipient who is not the provider of the reproductive material without the written consent of both the provider and recipient.⁵⁸

Statute of Limitations

The statute of limitations (SOL) determines the timeframe in which a criminal prosecution must be initiated.⁵⁹ The SOL in effect at the time a crime is committed controls.⁶⁰ In general, time is calculated from the day after a person commits an offense, and the filing of a charging document such as an indictment or information initiates the prosecution for the purpose of satisfying the time limitations.⁶¹ Regardless of whether a charging document is filed, the time limitation does not run during any time an offender is continuously absent from the state or otherwise undiscoverable because he or she lacks a reasonably ascertainable home address or place of employment; however, an extension under this scenario may not exceed the normal time limitation by more than three years.⁶²

⁵⁰ *Supra* note 39.

⁵¹ The act must be committed without the victim's consent. S. 794.011(1)(h), F.S.

⁵² A person 18 years of age or older who commits sexual battery upon a person 18 years of age or older, without that person's consent, and in the process does not use physical force or violence likely to cause serious personal injury commits a second degree felony, punishable by 15 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

⁵³ Jody Lynee Madeira, *Understanding Illicit Insemination*, *supra* note 2.

⁵⁴ Tex. Penal Code Ann. § 22.011 (2019).

⁵⁵ Ind. Code § 35-43-5-3 (2019).

⁵⁶ Jody Lynee Madeira, *Fertility Fraud: An Update*, Society for Reproductive Technology (Oct. 21, 2019), <https://www.sart.org/news-and-publications/news-and-research/legally-speaking/fertility-fraud-an-update/> (last visited Feb. 2, 2020).

⁵⁷ Cal. Penal Code § 367g (2019).

⁵⁸ *Id.*

⁵⁹ Section 775.15, F.S.

⁶⁰ *Beyer v. State*, 76 So. 3d 1132, 1135 (Fla. 4th DCA 2012).

⁶¹ Sections. 775.15(3)–(4), F.S.

⁶² Section 775.15(5), F.S.

Capital felonies,⁶³ life felonies,⁶⁴ and felonies resulting in a death are not subject to time constraints, and the state may bring charges at any time.⁶⁵ The standard time limitations for other crimes are:⁶⁶

- Four years for a first degree felony.
- Three years for a second or third degree felony.
- Two years for a first degree misdemeanor.
- One year for a second degree misdemeanor.

Exceptions to the standard SOL apply to certain crimes and circumstances. In particular, Florida extends or removes time limitations or changes the date on which calculation of the SOL begins for sex crimes, including sexual battery, lewd or lascivious offenses, and human trafficking.⁶⁷

The potential lapse of time between a fraudulent insemination and the discovery of such conduct may present a barrier to prosecution. Patients often do not discover fertility fraud until several years after the insemination has occurred.⁶⁸ For example, Donald Cline, an obstetrician from Indianapolis, Indiana, fraudulently inseminated multiple patients and fathered several children between 1974 and 1987.⁶⁹ His conduct was not discovered until 2014.⁷⁰

Health Care Professional Licensure

Section 456.072, F.S., authorizes a regulatory board or DOH, if there is no board, to discipline a health care practitioner's licensure for a number of offenses, including but not limited to:

- Making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession;
- Making deceptive, untrue, or fraudulent representations in or related to the practice of a profession or employing a trick or scheme in or related to the practice of a profession; or
- Engaging or attempting to engage in sexual misconduct as defined in s. 456.063, F.S.

Current statute does not specifically prohibit a health care practitioner from performing an act that would constitute fraudulent insemination. However, a board or DOH, if there is no board, could find that a health care practitioner who commits fraudulent insemination is subject to discipline under one of the existing fraud provisions.

Sexual misconduct involves a health care practitioner engaging, or attempting to engage, in verbal or physical sexual activity outside the scope of the professional practice of his or her health care profession with a patient or client, or an immediate family member, guardian, or representative of a patient or client.⁷¹ A health care practitioner who fraudulently inseminates a patient may or may not be subject to licensure discipline. since the behavior may be deemed not to constitute sexual activity as contemplated by statute.

If the board or DOH finds that a licensee committed a violation, the board or DOH may:⁷²

⁶³ Section 775.082, F.S.

⁶⁴ Id.

⁶⁵ Section 775.15(1), F.S.

⁶⁶ Section 775.15(2), F.S.

⁶⁷ An extension of a particular crime's SOL does not violate the ex post facto clause of the State Constitution if the extension takes effect before prosecution of an offense is barred by the old SOL and the new SOL clearly indicates it applies to cases pending upon its effective date. Art. I, s. 10, Fla. Const.; *Andrews v. State*, 392 So. 2d 270, 271 (Fla. 2d DCA 1980).

⁶⁸ *Supra* note 39.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Section 456.063, F.S. A person who commits such sexual misconduct is disqualified from licensure in this state.

⁷² Section 456.072(2), F.S.

- Refuse to certify, or to certify with restrictions, an application for a license;
- Suspend or permanently revoke a license;
- Place a restriction on the licensee's practice or license;
- Impose an administrative fine not to exceed \$10,000 for each count or separate offense; if the violation is for fraud or making a false representation, a fine of \$10,000 must be imposed for each count or separate offense;
- Issue a reprimand or letter of concern;
- Place the licensee on probation;
- Require a corrective action plan;
- Refund fees billed and collected from the patient or third party on behalf of the patient; or
- Require the licensee to undergo remedial education.

The board or DOH must consider what is necessary to protect the public or to compensate the patient when it decides the penalty to impose.⁷³

Effect of Proposed Changes

Consent for Pelvic Examinations

The bill prohibits a health care practitioner,⁷⁴ medical student, or any other student receiving health care practitioner training, from performing a pelvic examination on a patient without express written consent unless an exception applies. A health care practitioner must obtain written consent from the patient or the patient's representative that expressly identifies that a pelvic examination will be performed. The bill does not require a health care practitioner to obtain consent if:

- A court orders a pelvic examination be performed to collect evidence; or
- The pelvic examination is immediately necessary to avert a serious risk of imminent substantial and irreversible physical impairment of a major bodily function of the patient.

The bill defines pelvic examination as the series of tasks that comprise an examination of the vagina, cervix, uterus, fallopian tubes, ovaries, rectum, or external pelvic tissue or organs using any combination of modalities, including the health care practitioner's gloved hand or instrumentation.

Fraudulent Insemination

Licensure Discipline

The bill prohibits a health care practitioner from implanting a patient, or causing a patient to be implanted, with a human embryo without the patient's consent to the use of that embryo. Similarly, the bill prohibits a health care practitioner from inseminating a patient, or causing a patient to be inseminated, with human reproductive material⁷⁵ without the patient's consent to the use of human reproductive material from that donor. A health care practitioner who intentionally performs one of these acts is subject to licensure discipline.

The bill specifically bans a physician from intentionally implanting a patient, or causing a patient to be implanted, with a human embryo created with the reproductive material of the physician. Similarly, the bill bans a physician from inseminating a patient, or causing a patient to be inseminated, with the

⁷³ Id.

⁷⁴ Pursuant to s. 456.001(4), F.S., health care practitioners are defined to include acupuncturists, physicians, physician assistants, chiropractors, podiatrists, naturopaths, dentists, dental hygienists, optometrists, nurses, nursing assistants, pharmacists, midwives, speech language pathologists, nursing home administrators, occupational therapists, respiratory therapists, dieticians, athletic trainers, orthotists, prosthetists, electrologists, massage therapists, clinical laboratory personnel, medical physicists, dispensers of optical devices or hearing aids, physical therapists, psychologists, social workers, counselors, and psychotherapists, among others.

⁷⁵ The bill defines human reproductive material as any human egg or sperm or a human zygote. A zygote is a fertilized ovum.

human reproductive material of the physician. The bill establishes such action as a ground for disciplinary action against the physician's license.

Criminal Liability

Effective October 1, 2020, the bill creates the crime of reproductive battery, which prohibits a healthcare practitioner from intentionally implanting a human embryo without the patient's consent to the use of that embryo, or transferring into a recipient the reproductive material of a donor without the patient's consent to the use of reproductive material from that donor.

A health care practitioner who violates the prohibition commits a third degree felony, punishable by up to five years imprisonment and a \$5,000 fine.⁷⁶ A health care practitioner who violates the prohibition and is also the donor of the reproductive material commits a second degree felony, punishable by up to 15 years imprisonment and a \$10,000 fine. The bill requires DOH to issue an emergency order suspending the license of any physician, nurse, dentist, or pharmacist who pleads guilty to or is found guilty of this crime.

The bill tolls the statute of limitations for criminal prosecution of a reproductive battery until the date a violation is discovered and reported to law enforcement or another governmental agency. As such, the standard three-year statute of limitations for a third degree felony does not apply to a reproductive battery. This exception to the general statute of limitations will prevent a prosecution from being barred by a patient's failure to discover the healthcare practitioner's conduct until several years after the offense occurred.

The bill specifically prohibits the recipient's consent to the use of an anonymous donor as a defense to the crime of reproductive medicine.

The bill provides an effective date of July 1, 2020, except for creation of the crime of reproductive battery, which takes effect on October 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference considered the bill on February 10, 2020, and determined that it will likely have a positive insignificant impact, meaning it will result in an increase of 10 or fewer beds.⁷⁷

DOH may experience an increase in workload associated with additional complaints, investigations, and prosecutions; however, existing resources are adequate to absorb these impacts.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

⁷⁶ Sections 775.082, 775.083, or 775.084, F.S.

⁷⁷ Criminal Justice Impact Conference, *CS/HB 1287*, available at

<http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/CSHB1287.pdf> (last visited February 14, 2020).

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.