

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Rules

BILL: CS/CS/SB 716

INTRODUCER: Judiciary Committee; Health Policy Committee; and Senator Book

SUBJECT: Consent for Pelvic Examinations

DATE: April 15, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rossitto-Van Winkle	Brown	HP	Fav/CS
2.	Bond	Cibula	JU	Fav/CS
3.	Rossitto-Van Winkle	Phelps	RC	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 716:

- Amends, narrows, and simplifies the definition of “pelvic examination”;
- Amends current law requiring written consent for all pelvic examinations performed by health care practitioners and trainees to require written consent for anesthetized or unconscious patients and to require verbal consent from any conscious patient, with exceptions;
- Modifies the current exception allowing an examination to avert a serious risk of bodily impairment to simply refer to the statute on emergency services and care;
- Adds three new exceptions, thereby allowing an examination without consent, related to emergency medical conditions, a child protective investigation, and certain criminal offenses against a child; and
- Provides that a single written consent for a pelvic examination may authorize multiple health care practitioners or students to perform a pelvic examination on a pregnant woman having contractions.

The bill is effective July 1, 2021.

II. Present Situation:

The Department of Health

The Legislature created the Department of Health (DOH) to protect and promote the health of all residents and visitors in the state.¹ The DOH is charged with the regulation of health practitioners for the preservation of the health, safety, and welfare of the public. The Division of Medical Quality Assurance (MQA) is responsible for the regulatory boards² and professions within the DOH.³

Pelvic Examinations

In Florida, allopathic and osteopathic physicians, autonomous advanced practice registered nurses (autonomous APRNs), APRNs working under a protocol with a supervising physician whose practice includes a pelvic examination, licensed midwives, and physician assistants supervised by a physician whose practice includes pelvic examinations, may perform pelvic examinations and are subject to regulation by their respective board or council.⁴

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.⁵ This practice has been common since the late 1800s, 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.⁶

Several medical organizations have taken positions that pelvic examinations under anesthesia by students in a teaching environment should require the patient's informed consent:

¹ Section 20.43, F.S.

² Under s. 456.001(1), F.S., the term "board" is defined as any board, commission, or other statutorily created entity, to the extent such entity is authorized to exercise regulatory or rulemaking functions within the DOH or, in some cases, within the DOH, MQA.

³ Section 20.43, F.S.

⁴ *Supra* note 2; and chs. 458, 459, 464, and 467, F.S.

⁵ 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 Mar. 8, 2021); 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 Mar. 8, 2021); 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 Mar. 8, 2020); and Amanda Eisenberg, *New Bills Would Ban Pelvic Exams without Consent*, POLITICO (March, 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 Mar. 8, 2021).

⁶ 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), available at https://www.researchgate.net/publication/256066192_Using_Tort_Law_to_Secure_Patient_Dignity (last visited Mar. 8, 2021).

- The American Medical Association Council on Ethical and Judicial Affairs recommends that, 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.⁷
- The Association of American Medical Colleges, reversing its prior policy position, offered that “performing pelvic examinations on women under anesthesia, without their knowledge or approval ... is unethical and unacceptable.”⁸
- 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.”⁹

Forty-two states do not require the informed consent to pelvic examinations under anesthesia by students and residents. California, Hawaii, Illinois, Iowa, Maryland, Oregon, Utah, and Virginia prohibit unauthorized pelvic examinations.¹⁰

The Association of American Medical Colleges (AAMC) has found that most teaching hospitals inform patients that trainees will be involved in their care and, generally, patients approve of the trainees’ involvement.¹¹ 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.¹² Typically, students and residents practice pelvic examinations with special mannequins and standardized patients who are specifically trained for this purpose.¹³

Informed Consent

Informed consent for medical treatment is fundamental in both ethics and law.¹⁴ Informed consent is a process in which a health care provider educates a patient about the risks, benefits,

⁷ 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 (March 2001), available at <https://journalofethics.ama-assn.org/article/medical-student-involvement-patient-care-report-council-ethical-and-judicial-affairs/2001-03> (last visited Mar. 8, 2021).

⁸ 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 Mar. 8, 2021).

⁹ 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 Mar. 8, 2021).

¹⁰ Lorelei Laird, *Pelvic Exams Performed without Patients’ Permission Spur New Legislation*, ABA JOURNAL (September 2019), available at <http://www.abajournal.com/magazine/article/examined-while-unconscious> (last visited Mar. 8, 2021).

¹¹ Stacy Weiner, *What “Informed Consent” Really Means* (Jan. 24, 2019), available at <https://www.aamc.org/news-insights/what-informed-consent-really-means> (last visited Mar. 8, 2021).

¹² *Id.*

¹³ See note 11.

¹⁴ 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 Mar. 8, 2021).

and alternatives of a given procedure or intervention.¹⁵ A patient must be competent to make a voluntary decision about whether to undergo a procedure.

The idea of informed consent was established in 1914 in a case in which a patient was operated on without her consent.¹⁶ In determining whether she had a cause of action against the hospital in which the operation was formed, the judge in the case 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.”¹⁷

Informed Consent Relating to Forensic Examinations

When sexual assault occurs, the effective collection of evidence is of paramount importance to the successful prosecution of sex offenders.¹⁸

Florida law mandates the reporting of abuse and neglect of both adults and children.^{19,20} When the abuse or neglect involves sexual abuse or violence, human trafficking, sexual battery, prostitution, lewdness, indecent exposure, or obscenity, a forensic medical examination, sometimes including a pelvic examination, is often involved.

A forensic medical examination serves two purposes. The first is to address the medical needs of individuals disclosing sexual assault. This is accomplished, with the patient’s consent, by:²¹

- Evaluating and treating injuries;
- Conducting prompt examinations;
- Providing support, crisis intervention, and advocacy;
- Providing prophylaxis against sexually transmitted infections;
- Assessing female patients for pregnancy risk and discussing treatment options, including reproductive health services; and
- Providing follow-up care for medical and emotional needs.

The other purpose is to address justice system needs through forensic evidence collection. This is accomplished by:

- Obtaining a history of the assault;
- Documenting exam findings;
- Properly collecting, handling, and preserving evidence;

¹⁵ William Gossman, Imani Thornton, John Hipskind, *Informed Consent* (Aug. 22, 2020), available at <https://www.ncbi.nlm.nih.gov/books/NBK430827/> (last visited Mar. 8, 2021).

¹⁶ *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914).

¹⁷ *Id.*

¹⁸ *United States Department of Justice A National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents*, 2nd. Ed., Apr. 2013, available at <https://www.ojp.gov/pdffiles1/ovw/241903.pdf> (last visited Mar. 18, 2021).

¹⁹ Section 39.201, F.S.

²⁰ Section 415.1034, F.S.

²¹ State of Florida, Office of Attorney General, 2015, *Adult and Child Sexual Assault Protocols: Initial Forensic Physical Examination*, available at [http://myfloridalegal.com/webfiles.nsf/WF/JFAO-77TKCT/\\$file/ACSP.pdf](http://myfloridalegal.com/webfiles.nsf/WF/JFAO-77TKCT/$file/ACSP.pdf) (last visited Mar. 18, 2021).

- Interpreting and analyzing findings; and
- Subsequently presenting findings and providing factual and expert opinion related to the exam and evidence collection.

Victims of sexual violence, like any other individual, must give informed consent to a forensic medical examination before the examination may be performed. A health care practitioner, a medical student, or any other student receiving training as a health care practitioner may not perform a pelvic examination on a patient without the written consent of the patient or the patient's legal representative executed specific to, and expressly identifying, the pelvic examination, unless:

- A court orders performance of the pelvic examination for the collection of 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.²²

In the event that the victim is a child, or an adult who lacks the capacity to give consent, the victim's legal representative may sign the consent forms. If the victim is unable to consent due to being incapacitated, the examiner may not commence with the examination without a court order.²³

Florida Requirements for Informed Consent

In Florida the only general law on medical consent appears in ch. 766, F.S., Medical Malpractice and Related Matters.²⁴ However, Florida physicians and physicians practicing within a postgraduate training program approved by the Board of Medicine (BOM) and the Board of Osteopathic Medicine (BOOM) must explain the medical or surgical procedure to be performed to the patient and obtain the informed consent of the patient. The physician is not required to obtain or witness the signature of the patient on a written form evidencing informed consent, and there is no requirement that the patient use a written document, although hospitals and facilities where procedures are performed typically require consent in writing.^{25,26}

In 2020 the Florida Legislature created s. 456.51, F.S., *Consent for pelvic examination*,²⁷ in response to media reports that medical students may be performing pelvic examinations on

²² Section 456.51, F.S.

²³ *Id.*

²⁴ Section 766.103, F.S., provides: No recovery shall be allowed in any court in this state against any physician, chiropractor, podiatric physician, dentist, APRN, or PA in an action brought for treating, examining, or operating on a patient without his or her informed consent when: 1) The action of the practitioner in obtaining the consent of the patient, or another person authorized to give consent for the patient, was in accordance with an accepted standard of medical practice among members of the medical profession with similar training and experience in the same or similar medical community; and 2) A reasonable person, from the information provided under the circumstances, would have a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures, recognized among practitioners in the same or similar community who perform similar treatments or procedures; or 3) The patient would reasonably, under all the surrounding circumstances, have undergone the treatment or procedure had he or she been advised by practitioner in accordance with the provisions of the first.

²⁵ Fla. Adm. Code R. 64B8-9.007, and 64B15-14.006 (2019).

²⁶ See The Joint Commission, Advisory on Safety Issues, Issue 21, (Feb. 2016), *Informed Consent: More than Getting a Signature*, available at https://www.jointcommission.org/-/media/tjc/documents/newsletters/quick_safety_issue_twenty-one_february_2016pdf.pdf (last visited Mar. 8, 2021).

²⁷ CS/CS/SB 698, Ch. 2020-31, s. 3, Laws of Fla.

anesthetized or unconscious women without obtaining informed consent from the woman prior to anesthesia or from any other person who can provide consent.²⁸

Section 456.51(1), F.S., defines a “pelvic examination” to include a series of tasks that encompass an examination of the vagina, cervix, uterus, fallopian tubes, ovaries, rectum, or external pelvic tissue or organs using any combination of modalities, which may include, but need not be limited to, the health care provider’s gloved hand or instrumentation. Under current law, a health care practitioner, medical student, or any other student receiving training as a health care practitioner is not permitted to perform a pelvic examination on a patient without the written consent of the patient or the patient’s legal representative, executed specific to, and expressly identifying, the pelvic examination, unless:

- A court orders the performance of the examination for the collection of 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.

Following the enactment of Chapter 2020-31, s. 3, Laws of Florida (2020), conflicts in the medical community arose as to how the law’s language should be interpreted, and a Petition for Declaratory Statement²⁹ was filed with the Florida Board of Medicine (BOM), requesting a determination of:

- Whether the definition of pelvic examination applies only to female patients or to males as well;
- Whether performance of surgery on the vagina, cervix, uterus, fallopian tubes, ovaries, rectum, or external pelvic tissue or organs constitutes a pelvic examination;
- Whether a discrete visual examination of the vagina, cervix, uterus, fallopian tubes, ovaries, rectum, or external pelvic tissue or organs constitutes a pelvic examination;
- Whether a pelvic examination requires separate written consents every time a pelvic examination was performed during a course of treatment; and
- Whether a pelvic examination in emergent circumstances required a written consent when the patient or a legal representative were unable to give consent.

The BOM, in a Final Order³⁰ to a Petition for Declaratory Statement filed by numerous physician organizations, answered the above questions regarding what constitutes a pelvic examination under s. 456.51, F.S., as follows:

- A pelvic examination applies only to female patients;
- Surgery on the vagina, cervix, uterus, fallopian tubes, ovaries, rectum, or external pelvic tissue or organs does not constitute a pelvic examination; and
- Discrete visual examination of the vagina, cervix, uterus, fallopian tubes, ovaries, rectum, or external pelvic tissue or organs does not constitute a pelvic examination.

²⁸ See Emma Goldberg, *She Didn’t Want a Pelvic Exam. She Received One Anyway*, NEW YORK TIMES, Feb 17, 2020, updated Feb. 19, 2020, available at <https://www.nytimes.com/2020/02/17/health/pelvic-medical-exam-unconscious.html> (last visited Mar. 8, 2021).

²⁹ See Florida Department of Health, Board of Medicine, Final Order NO DOH-20-1553-DS-MQA filed Oct. 9, 2020, available at https://s3.amazonaws.com/thenewsserviceofflorida/web/dist/downloads/2020/10/DOH_20-1553_DS_Doug_Murphy_FMA_etc_1.pdf (last visited Mar. 8, 2021).

³⁰ *Id.*

The BOM declined to answer the questions regarding informed consent.

III. Effect of Proposed Changes:

CS/CS/SB 716:

- Amends, narrows, and simplifies the definition of “pelvic examination,” thereby narrowing the scope and application of s. 456.51, F.S., to:
 - Specify that the term means a manual examination of the organs of the female reproductive system, whether by hand or by instrument.
 - Exclude from the definition a visual assessment, imaging, or a nondiagnostic medical or surgical procedure.
- Amends current law requiring written consent for all pelvic examinations performed by health care practitioners, medical students, and trainees, to require written consent only for anesthetized or unconscious patients.
- Requires that informed verbal consent to a pelvic examination be obtained from any conscious patient, regardless of whether there is a written authorization.
- Amends the current-law exception pertaining to cases in which a pelvic examination is immediately necessary to avert a serious risk of imminent substantial and irreversible physical impairment of a major bodily function, to instead pertain to cases in which the examination is necessary for the provision of emergency services and care as defined in s. 395.002, F.S.³¹
- Creates three new exceptions, in addition to those found in current law, for situations in which a pelvic examination is administered pursuant to:
 - An emergency medical condition.³²
 - A child protective investigation under ch. 39, F.S.
 - A criminal investigation of an alleged violation related to child abuse or neglect under statutes that address human trafficking, sexual battery, prostitution, lewdness, indecent exposure, child abuse, or obscenity.
- Allows a single written consent form to be used in a licensed hospital to authorize multiple health care practitioners or students performing pelvic examinations on a pregnant woman having contractions.

The bill effective July 1, 2021.

³¹ Section 395.002(9), F.S., defines “emergency services and care” to mean medical screening, examination, and evaluation by a physician, or, to the extent permitted by applicable law, by other appropriate personnel under the supervision of a physician, to determine if an emergency medical condition exists and, if it does, the care, treatment, or surgery by a physician necessary to relieve or eliminate the emergency medical condition, within the service capability of the facility.

³² Section 395.002(8), F.S., defines “emergency medical condition” to mean a medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that the absence of immediate medical attention could reasonably be expected to result in any of the following: 1. Serious jeopardy to patient health, including a pregnant woman or fetus. 2. Serious impairment to bodily functions. 3. Serious dysfunction of any bodily organ or part. With respect to a pregnant woman, the term also means: 1. That there is inadequate time to effect safe transfer to another hospital prior to delivery; 2. That a transfer may pose a threat to the health and safety of the patient or fetus; or 3. That there is evidence of the onset and persistence of uterine contractions or rupture of the membranes.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

The bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 456.51 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on March 29, 2021:

The committee substitute changes the definition of exam to only include manual examination of any part of the female reproductive system; adds that verbal consent to an exam must be solicited from a conscious patient even if a prior written consent is on file; moves the part of the procedure exception into the definition of an exam; removes the general concept of multiple exams being authorized by one written authorization; and creates a limited authority for multiple consents utilizing one written consent that only applies to a woman in a hospital having contractions.

CS by Health Policy on March 17, 2021:

The CS provides two new exceptions to the requirement that written consent be obtained before a pelvic examination may be performed, in addition to those found in current law, for cases in which the examination is administered pursuant to:

- A child protective investigation under ch. 39, F.S.; and
- A criminal investigation of an alleged violation, related to child abuse or neglect, of statutes that address human trafficking, sexual battery, prostitution, lewdness, indecent exposure, or obscenity.

- B. **Amendments:**

None.