

LETTER OPINION
95-L-165

July 21, 1995

Mr. John Goff
Cass County State's Attorney
PO Box 2806
Fargo, ND 58107-2806

Dear Mr. Goff:

Thank you for your letter asking whether the statutory requirement that a woman seeking an abortion be provided with the name of the physician who will perform the procedure at least 24 hours in advance is satisfied if the woman is provided the names of two physicians who regularly perform abortion procedures at the particular clinic involved, one of whom will be the performing physician, assuming that the patient is provided with the name of the actual performing physician at the time she arrives at the clinic prior to the procedure.

The state constitutionally may require that the decision to obtain an abortion be an informed decision and also may require the woman to provide prior written consent. See generally, Planned Parenthood v. Danforth, 428 U.S. 52, 67 (1976), see also, Planned Parenthood v. Casey, ____ U.S. ____, 112 S.Ct. 2791, 2821, 2822-2826 (three justice plurality) (1992); Fargo Women's Health Org. v. Schafer, 18 F.3d 526 (8th Cir. 1994). Informed consent generally means "the giving of information to the patient as to just what would be done and as to its consequences," however, any greater requirement "might well confine the attending physician in an undesired and uncomfortable straightjacket in the practice of his profession." Danforth at 67 n.8. Although a physician does not have a right to perform medical procedures which is greater than the patient's right to receive care, the state may not impinge upon a woman's right to obtain an abortion by placing requirements upon her physician which would constitute an undue burden on her decision. Whalen v. Roe, 429 U.S. 589, 604 n.33 (1977).

The medical procedure of abortion is regulated by the Abortion Control Act, N.D.C.C. ch. 14-02.1. N.D.C.C. § 14-02.1-03(1) provides, in pertinent part, that "[n]o physician shall perform an abortion unless prior to such performance the physician certified in writing that the woman gave her informed consent as defined and provided in section 14-02.1-02" (Emphasis added.) North Dakota's informed consent statute has been held to meet constitutional requirements.

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Fargo Women's Health Org. v. Schafer, 18 F.3d 526 (8th Cir. 1994).

Under the Abortion Control Act, informed consent means "voluntary consent to abortion by the woman upon whom the abortion is to be performed," with the requirement that certain information be provided to her. N.D.C.C. § 14-02.1-02(5). Among other things, the woman must be told "[t]he name of the physician who will perform the abortion" at least 24 hours before the procedure takes place. N.D.C.C. § 14-02.1-02(5)(a)(1). As a general principle of statutory interpretation, "[w]ords used in the singular number include the plural and words used in the plural number include the singular, except when a contrary intention plainly appears." N.D.C.C. § 1-01-35. N.D.C.C. § 14-02.1-02(5)(a)(1) does not plainly require that only one physician may be named. Therefore, N.D.C.C. § 1-01-35 provides that N.D.C.C. § 14-02.1-02(5)(a)(1) may be satisfied by naming more than one physician who "will perform the abortion."

However, the conclusion that N.D.C.C. § 14-02.1-02(5)(a)(1) permits more than one physician to be named does not address the situation where more than one physician is named but only one physician will perform the procedure. "A statute is ambiguous if it is susceptible to differing but rational meanings." Kallhoff v. N.D. Workers Comp. Bureau, 484 N.W.2d 510, 512 (N.D. 1992). Statutes that are clear and unambiguous may contain a latent ambiguity when applied to a particular situation. See Kroh v. American Family Ins., 487 N.W.2d 306, 308 (N.D. 1992). N.D.C.C. § 14-02.1-02(5)(a)(1) is susceptible to differing but rational meanings in light of the situation you have posed. If a woman is informed of the name of the physician who will perform the abortion, then it may be rationally concluded that if she is also provided with the name of another physician who may perform the abortion, but ultimately does not, then N.D.C.C. § 14-02.1-02(5)(a)(1) has been satisfied because she had a opportunity to evaluate the physician "who will perform the abortion" when deciding to consent to the procedure. Alternatively, the directive of N.D.C.C. § 14-02.1-02(5)(a)(1) may be rationally determined to require that a woman must be provided only with the name of the physician or physicians who will perform the abortion rather than being told the names of several other physicians, none of whom will perform the procedure, because this does not provide a reasonable opportunity for her to evaluate the physician and knowingly consent. In this regard, N.D.C.C. § 14-02.1-02(5)(a)(1) is ambiguous.

The intent of the Legislature must be ascertained when construing statutory provisions. Republican Comm. v. Democrat

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Comm., 466 N.W.2d 820, 824 (N.D. 1991). "If the language of a statute is ambiguous or of doubtful meaning, extrinsic aids may be used to interpret the statute." Kim-Go v. J.P. Furlong Enters., Inc., 460 N.W.2d 694, 696 (N.D. 1990). Extrinsic aids which may be considered in determining the legislative intent of an ambiguous statute include, among other matters, the object sought to be attained, the circumstances under which the statute was enacted, the legislative history, the common law or former statutory provisions, including laws upon the same or similar subjects, the consequences of a particular construction, the administrative construction of the statute, and the preamble. N.D.C.C. § 1-02-39.

Although no statement in the legislative history can be said to have addressed this particular question, the legislative history does shed light upon the object sought to be attained by N.D.C.C. § 14-02.1-02(5)(a)(1). This requirement was enacted as part of House Bill No. 1579 during the 1991 Legislative Session. 1991 N.D. Sess. Laws ch. 141, § 1. The general purpose of the informed consent provisions was to provide a woman desiring an abortion with information about the medical risks of the procedure and to provide her with an opportunity to review information about agencies that provide alternatives to abortion and noninflammatory, scientifically accurate information about the fetus. Hearing on H. 1579 Before the House Comm. on Human Services and Veterans Affairs, 52nd N.D. Leg. (February 12, 1991) (statement of Representative Boehm).

The statutory requirement that a woman must be provided with the name of the physician who will perform the abortion must be construed in the context of the legislative intent to provide a woman with "all of the information necessary to make the decision" to have an abortion, Hearing on H. 1579 Before the House Comm. on Human Services and Veterans Affairs, 52nd N.D. Leg. (February 12, 1991) (statement of Representative Kerzman), and court decisions addressing the constitutionality of similar statutes.

The name of the physician who will perform a medical procedure, without further information, provides nothing upon which a person could base a decision to undertake the procedure. The name is a starting point from which a person can investigate the physician's reputation and qualifications to perform the procedure. Obviously, an incompetent physician is a medical risk. A construction of N.D.C.C. § 14-02.1-02(5)(a)(1) to allow two physicians to be named, only one of whom would perform the procedure, would not violate the purpose of the statute. Although providing two physicians' names arguably would not prevent a woman from

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adequately investigating both physicians, it is a factual issue beyond the scope of this opinion at what point providing too many names would prevent a reasonable opportunity to investigate the physicians' reputations and qualifications and therefore inhibit the informed consent provision.

Likewise, a construction of N.D.C.C. § 14-02.1-02(5)(a)(1) to require that a physician or the physician's agent only provide the name of the physician who, without doubt, will be performing the procedure might arguably be unconstitutional as an undue burden upon a woman's right to obtain an abortion. The United States Supreme Court has held:

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

Planned Parenthood v. Casey, *supra*, ____ U.S. ____, 112 S.Ct. 2791, 2820 (three justice plurality). "Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden." *Id.* at 2821. "As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.* at 2821.

Interpreting N.D.C.C. § 14-02.1-02(5)(a)(1) to prohibit a physician or the physician's agent from providing the names of two physicians arguably might be a "substantial obstacle in the path of a woman seeking an abortion." If scheduling could not be ascertained 24 hours in advance or the advice proved to be wrong which required rescheduling, then the 24-hour delay in providing new information and rescheduling the abortion arguably would be considered an unconstitutional obstacle. See Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 532-534 (8th Cir. 1994) (upholding certain other provisions of North Dakota's informed consent requirements in part because a limitation in scheduling the availability of physicians was

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not a limitation resulting from state action). In finding the disputed informed consent requirements posed no undue burden, the circuit court observed the "close similarity" between the informed consent requirements of the North Dakota statute and the Pennsylvania statute upheld in Casey. Id. at 532. See also Casey at 2822-2824.

Violations of the informed consent requirements are criminal offenses. N.D.C.C. § 14-02.1-11. Criminal statutes are to be strictly construed against the state and in favor of the accused. State v. Rambousek, 479 N.W.2d 832, 834 (N.D. 1992). Furthermore, "if a statute is susceptible of two constructions, one of which will be compatible with constitutional provisions or one which will render the statute unconstitutional, we must adopt the construction which will make the statute valid." Paluck v. Board of Cty. Com'rs, Stark Cty., 307 N.W. 852, 856 (N.D. 1981).

It is my opinion that N.D.C.C. § 14-02.1-02(5)(a)(1) is satisfied if the names of two physicians are provided, one of whom will definitely perform the procedure, and the woman is told who the performing physician is before undertaking the procedure. I do not express an opinion on whether providing more than two names would be permissible.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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