

LETTER OPINION
93-L-115

March 24, 1993

Mr. John T. Goff
Cass Co. State's Attorney
P.O. Box 2806
Fargo, ND 58108

Dear Mr. Goff:

Thank you for your March 4, 1993, letter requesting an opinion concerning compliance with the informed consent requirements of N.D.C.C. ch. 14-02.1, North Dakota's Abortion Control Act. I agree that a consistent approach to enforcement of these provisions is in the best interests of all concerned. The following discussion is not intended to be an exhaustive analysis of every requirement under the Act; rather, it addresses some of the significant requirements necessary for compliance as a result of the 1991 amendments to the Act. See 1991 N.D. Sess. Law ch. 141.

The principles of statutory construction found at N.D.C.C. §§ 1-02-02, 1-02-03, and 1-02-05 govern this analysis. These statutes require that when the language of a statute is unambiguous, words must be given their plain, ordinary, and commonly understood meaning; and, they must be construed according to the rules of grammar. *Kim-Go v. J.P. Furlong Enters., Inc.*, 460 N.W.2d 694 (N.D. 1990).

N.D.C.C. § 14-02.1-03 prohibits a physician from performing an abortion unless, prior to performing the procedure, the physician or an agent certifies in writing that the woman gave her informed consent as

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defined in N.D.C.C. § 14-02.1-02. Informed consent, as provided for in N.D.C.C. § 14-02.1-02, contains four basic requirements. The first two requirements concern information that must be provided to or offered to the woman at least twenty-four hours prior to the abortion. The third and fourth requirements concern the woman's written certification that the information was provided or offered as required by the law.

In order to obtain a woman's informed consent the woman must be told by the physician who is to perform the abortion, a referring physician, or the physician's agent, at least 24 hours before the abortion: the name of the physician who will perform the procedure; the medical risks associated with the particular procedure to be employed; the probable gestational age of the fetus at the time the procedure will be performed; and, the medical risks associated with carrying the pregnancy to term. N.D.C.C. § 14-02.1-02(5)(a).

The information in N.D.C.C. § 14-02.1-02(5)(a)(3) concerning gestational age may be given to the woman by the physician's agent, although ultimately probable gestational age must be determined by a physician. Probable gestational age means "what, in the judgment of the attending physician, will with reasonable probability be the gestational age of the unborn child at the time the abortion is to be performed." N.D.C.C. § 14-02.1-02(8). In Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992), the court described the method for determining gestational age. The "duration of pregnancy can be measured from the last menstrual period (LMP) or from conception. Calculation of conception age begins 2 weeks later than LMP. See, e.g., F. Gary Cunningham, Paul C. MacDonald and Norman F. Gant, Williams Obstetrics at 87 (18th ed. 1989)." 809 F. Supp. at 869. Although N.D.C.C. § 14-02.1-02(8) requires that a physician

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exercise his or her judgment in determining gestational age, the statute does not specify how this must be accomplished.

The North Dakota Supreme Court has recognized that an attending physician may delegate routine acts of treatment which do not require specialized medical knowledge and which are performed as part of a nurse's or qualified assistant's duties. See Nelson v. Trinity Medical Center, 419 N.W.2d 886, 890-91 (N.D. 1988). Thus, a qualified assistant or nurse may assist the attending physician in exercising his or her judgment in determining gestational age. Indeed, in Planned Parenthood v. Casey, 112 S. Ct. 2791, 2824 (1992), the Court noted that similar tasks could be performed by a qualified assistant. See also Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 445-46 n.37 (1983) ("information could be given by a qualified person assisting the physician").

Since gestational age can be determined by information obtained from the woman, i.e., the date of the LMP or conception, a personal visit to a physician or the qualified assistant is not required. Thus, a physician may delegate the tasks associated with obtaining this information provided that the physician ultimately exercises his or her judgment concerning the determination of gestational age.

N.D.C.C. § 14-02.1-02(5)(b) requires that, at least 24 hours before the abortion, the physician or the physician's agent must inform the woman about the possibility of medical assistance benefits and child support, and that she has the right to review materials prepared by the state of North Dakota. The physician or the physician's agent must orally inform the woman that the materials have been provided by the state of North Dakota and that they describe the gestational development of the fetus and contain a list of agencies that offer alternatives to abortion.

If the woman requests the information, copies must be provided to her. N.D.C.C. § 14-02.1-02(5)(b)(3). The requirement that the physician or physician's agent

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orally describe the printed materials may be satisfied either by communicating the information in person or over the telephone.

N.D.C.C. § 14-02.1-03.1(1) prohibits performing an abortion upon a woman under the age of 18 unless the attending physician obtains the written consent of the minor and her parents; she is married and the attending physician obtains her consent; or the juvenile court has authorized the procedure. For an unemancipated minor, 24 hours before the minor's consent, the attending physician must provide to the parents, in person, the information described in section 14-02.1-02; or, 48 hours prior to the minor's consent, the physician must certify that he or she caused that information to be sent by certified mail to each of the parents at his or her last known address. N.D.C.C. § 14-02.1-03(1). This notification procedure is not required if the minor elects to proceed with the juvenile court authorization process. N.D.C.C. § 14-02.1-03(1).

Thus, the only section of the law that requires an in-person meeting is the parental notification requirement described in N.D.C.C. § 14-02.1-03(1); and, if the physician mails the required information 48 hours prior to obtaining the minor's consent, an in-person contact with the parents is not required. Therefore, the remaining components of the first two informed consent requirements may be done over the telephone or in writing, as well as in person.

The third requirement of informed consent provides that prior to the abortion, the woman must certify that the required information has been furnished to her and that she has been given the opportunity to review the printed information. N.D.C.C. § 14-02.1-02(5)(c). The fourth requirement is satisfied by the physician's or the physician's agent's certification that he or she received a copy of the woman's certification. N.D.C.C. § 14-02.1-02(5)(d). These certifications may be executed immediately before the procedure is performed.

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In conclusion, the description of the state-printed materials must be given by telephone or in person at least 24 hours prior to the procedure. Parental notification must occur in person at least 24 hours before the minor consents to the procedure, unless the physician has posted the information by certified mail 48 hours prior to the minor's consent. The remaining information, the name of the physician, medical risks of the procedure, gestational age, medical risks of carrying the pregnancy to term, medical assistance benefits, child support liability, and the right to review printed materials, may be provided by any form of communication, including by telephone or in person, or, in writing, by mail or facsimile, as long as it occurs at least 24 hours prior to the procedure. The woman's certification must be in writing and may be obtained at any time after the required information has been provided or offered, but before the procedure occurs. Finally, the certification of the physician, or physician's agent, must be in writing and must be obtained after the physician or agent receives a copy of the woman's certification, but before the procedure is performed.

I trust this information will assist you in determining what conduct is in compliance with the 1991 amendments to N.D.C.C. ch. 14-02.1.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

shf/vkk