

S.D. Codified Laws § 34-23A-10.1

Current through acts SB17, SB18, SB21, SB22, SB25, SB26, SB27, SB28, SB30, SB32, SB35, SB36, SB37, SB38, SB39, SB40, SB41, SB42, SB45, SB48, SB49, SB52, SB56, SB57, SB60, SB61, SB64, SB66, SB67, SB71, SB75, SB88, HB1003, HB1006, HB1009, HB1010, HB1011, HB1013, HB1014, HB1015, HB1017, HB1018, HB1019, HB1020, HB1021, HB1023, HB1024, HB1026, HB1027, HB1028, HB1029, HB1030, HB1031, HB1032, HB1034, HB1035, HB1037, HB1038, HB1039, HB1040, HB1041, HB1042, HB1043, HB1046, HB1047, HB1048, HB1049, HB1050, HB1052, HB1061, HB1062, HB1063, HB1064, HB1065, HB1066, HB1068, HB1069, HB1071, HB1072, HB1074, HB1076, HB1077, HB1078, HB1079, HB1080, HB1082, HB1084, HB1085, HB1086, HB1087, HB1088, HB1094, HB1095, HB1096, HB1097, HB1098, HB1099, HB1100, HB1101, HB1102, HB1105, HB1113, HB1115, HB1117, HB1119, HB1136, HB1143, HB1148, HB1159, HB1173, HB1185, HB1205, HB1112, HB1213, HB1214, HB1219, HB1244, HB1249 from the 2018 Special Session of the 93rd Legislative Assembly, Supreme Court Rule 18-15, and the November 8, 2016 General Election.

LexisNexis® South Dakota Codified Laws Annotated > Title 34 Public Health and Safety (Chs. 34-1 — 34-51) > Chapter 34-23A Performance of Abortions (§§ 34-23A-1 — 34-23A-73)

34-23A-10.1. Voluntary and informed consent required — Medical emergency exception — Information to be provided.

No abortion may be performed unless the physician first obtains a voluntary and informed written consent of the pregnant woman upon whom the physician intends to perform the abortion, unless the physician determines that obtaining an informed consent is impossible due to a medical emergency and further determines that delaying in performing the procedure until an informed consent can be obtained from the pregnant woman or her next of kin in accordance with chapter 34-12C is impossible due to the medical emergency, which determinations shall then be documented in the medical records of the patient. A consent to an abortion is not voluntary and informed, unless, in addition to any other information that must be disclosed under the common law doctrine, the physician provides that pregnant woman with the following information:

- (1)**A statement in writing providing the following information:
 - (a)**The name of the physician who will perform the abortion;
 - (b)**That the abortion will terminate the life of a whole, separate, unique, living human being;
 - (c)**That the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota;
 - (d)**That by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated;
 - (e)**A description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including:
 - (i)**Depression and related psychological distress;
 - (ii)**Increased risk of suicide ideation and suicide;
 - (iii)**A statement setting forth an accurate rate of deaths due to abortions, including all deaths in which the abortion procedure was a substantial contributing factor;

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- (iv)**All other known medical risks to the physical health of the woman, including the risk of infection, hemorrhage, danger to subsequent pregnancies, and infertility;
- (f)**The probable gestational age of the unborn child at the time the abortion is to be performed, and a scientifically accurate statement describing the development of the unborn child at that age;
- (g)**The statistically significant medical risks associated with carrying her child to term compared to undergoing an induced abortion;
- (h)**That even after a pregnant mother takes Mifepristone it is still possible to discontinue a drug-induced abortion by not taking the prescribed Misoprostol; and
- (i)**That information on discontinuing a drug-induced abortion is available on the Department of Health website.

The disclosures set forth above shall be provided to the pregnant woman in writing and in person in full compliance with § 34-23A-56. The physician shall ensure that the pregnant woman signs each page of the written disclosure with the certification that she has read and understands all of the disclosures, prior to the patient signing a consent for the procedure. If the pregnant woman asks for a clarification or explanation of any particular disclosure, or asks any other question about a matter of significance to her, the explanation or answer shall be made in writing and be given to the pregnant woman before signing a consent for the procedure and shall be made part of the permanent medical record of the patient;

(2)A statement by telephone or in person, by the physician who is to perform the abortion, or by the referring physician, or by an agent of both, at least twenty-four hours before the abortion, providing the following information:

- (a)**That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;
- (b)**That the father of the unborn child is legally responsible to provide financial support for her child following birth, and that this legal obligation of the father exists in all instances, even in instances in which the father has offered to pay for the abortion;
- (c)**The name, address, and telephone number of a pregnancy help center in reasonable proximity of the abortion facility where the abortion will be performed; and
- (d)**That she has a right to review all of the material and information described in § 34-23A-1, §§ 34-23A-1.2 to 34-23A-1.7, inclusive, § 34-23A-10.1, and § 34-23A-10.3, as well as the printed materials described in § 34-23A-10.3, and the website described in § 34-23A-10.4. The physician or the physician's agent shall inform the pregnant woman, orally or in writing, that the materials have been provided by the State of South Dakota at no charge to the pregnant woman. If the pregnant woman indicates, at any time, that she wants to review any of the materials described, such disclosures shall be either given to her at least twenty-four hours before the abortion or mailed to her at least seventy-two hours before the abortion by certified mail, restricted delivery to addressee, which means the postal employee can only deliver the mail to the addressee;

(3)A written statement that sex-selective abortions are illegal in the State of South Dakota and that a pregnant mother cannot have an abortion, either solely or partly, due to the unborn child's sex, regardless of whether that unborn child is a girl or a boy or whether it is of the pregnant mother's free will or the result of the use of pressure and coercion; and

(4)A written notification, prepared and provided to each abortion facility by the Department of Health, that contains the name, text, and telephone number of an organization fighting to end sex trafficking and states the following: "If someone is sexually abusing you or causing you to exchange sex for something of value, and you want help, call 911, text, or call the number provided on this notice."

Prior to the pregnant woman signing a consent to the abortion, she shall sign a written statement that indicates that the requirements of this section have been complied with. Prior to the performance of the

abortion, the physician who is to perform the abortion shall receive a copy of the written disclosure documents required by this section, and shall certify in writing that all of the information described in those subdivisions has been provided to the pregnant woman, that the physician is, to the best of his or her ability, satisfied that the pregnant woman has read the materials which are required to be disclosed, and that the physician believes she understands the information imparted.

History

SL 1980, ch 245, § 1; 1993, ch 249, § 4; 2003, ch 185, § 2; 2005, ch 186, § 7; 2014, ch 168, § 4, eff. July 1, 2014; 2016, ch 176, § 1, eff. July 1, 2016; 2016, ch 179, § 4, eff. July 1, 2016; 2017 SB102, § 1, eff. July 1, 2017.

Annotations

LexisNexis® Notes

Notes

Editor's note.

On June 30, 2005, the U.S. District Court for the District of South Dakota issued a temporary injunction (as set out in *Planned Parenthood v. Rounds*, 375 F. Supp. 2d 881, 2005 U.S. Dist. LEXIS 17202) blocking the July 1 implementation of the 2005 amendment by ch 186. The preliminary injunction was vacated by the 8th Circuit Court of Appeals and the matter was recommended to the district court for further proceedings in *Planned Parenthood, N.D., S.D. v. Rounds*, 530 F.3d 724 (2008).

SL 2005, ch 186, § 10 provides: "If any court of law enjoins, suspends, or delays the implementation of the provisions of section 7 of this Act [§ 34-23A-10.1], the provisions of § 34-23A-10.1, as of June 30, 2005, are effective during such injunction, suspension, or delayed implementation."

SL 2005, ch 186, § 11 provides: "If any court of law finds any provisions of section 7 of this Act [§ 34-23A-10.1] to be unconstitutional, the other provisions of section 7 are severable. If any court of law finds the provisions of section 7 of this Act to be entirely or substantially unconstitutional, the provisions of § 34-23A-10.1, as of June 30, 2005, are immediately reeffective."

Amendments.

The 2005 amendment rewrote the section, which read:

"No abortion may be performed except with the voluntary and informed consent of the female upon whom the abortion is to be performed. Except in the case of a medical emergency, consent to an abortion is voluntary and informed only if:

"(1) The female is told the following by the physician who is to perform the abortion or by the referring physician, at least twenty-four hours before the abortion:

"(a) The name of the physician who will perform the abortion;

"(b) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies, and infertility;

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“(c) The probable gestational age of the unborn child at the time the abortion is to be performed; and

“(d) The medical risks associated with carrying her child to term;

“(2) The female is informed, by telephone or in person, by the physician who is to perform the abortion, by the referring physician, or by an agent of either, at least twenty-four hours before the abortion:

“(a) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;

“(b) That the father is liable to assist in the support of her child, even in instances in which the father has offered to pay for the abortion; and

“(c) That she has the right to review the printed materials described in § 34-23A-10.3 and the website described in § 34-23A-10.4. The physician or the physician’s agent shall orally inform the female that the materials have been provided by the State of South Dakota at no charge to the female. If the female chooses to view the materials, they shall either be given to her at least twenty-four hours before the abortion or mailed to her at least seventy-two hours before the abortion by certified mail, restricted delivery to addressee, which means the postal employee can only deliver the mail to the addressee;

“(3) The female certifies in writing, prior to the abortion, that the information described in subdivisions (1) and (2) of this section has been furnished her, and that she has been informed of her opportunity to review the information described in § 34-23A-10.3; and

“(4) Prior to the performance of the abortion, the physician who is to perform the abortion or the physician’s agent receives a copy of the written certification prescribed by subdivision (3).

“The physician may provide the information prescribed in subdivision (1) by telephone without conducting a physical examination or tests of the patient, in which case the information required to be supplied may be based on facts supplied the physician by the female and whatever other relevant information is reasonably available to the physician.”

The 2014 amendment added new subdivision, which read: “A written statement that sex-selective abortions are illegal in the state of South Dakota and that a pregnant mother cannot have an abortion, either solely or partly, due to the unborn child’s sex, regardless of whether that unborn child is a girl or a boy or whether it is of the pregnant mother’s free will or the result of the use of pressure and coercion.”

The 2016 amendments to this section by ch. 179 substituted “in full compliance with § 34-23A-56” for “no later than two hours before the procedure is to be performed” in the first sentence of the last paragraph of (1).

The 2016 amendments to this section by ch. 176 added (1)(h) and (1)(i); and made a related change.

The 2017 amendment by ch. 160 added (4) and made a related change.

Case Notes

Constitutional Law: Bill of Rights: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

Constitutional Law: Substantive Due Process: Privacy: Personal Decisions

Governments: Legislation: Vagueness

Healthcare Law: Treatment: End-of-Life Decisions: Abortion: General Overview

Healthcare Law: Treatment: End-of-Life Decisions: Abortion: Right to Privacy

Healthcare Law: Treatment: Patient Consent: General Overview

Healthcare Law: Treatment: Patient Consent: Informed Consent

Constitutional Law: Bill of Rights: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

District court properly enjoined enforcement of measures enacted revising the South Dakota law on informed consent to abortion, S.D. Codified Laws § 34-23A-10.1, requiring that the doctor provide a written statement to the patient two hours before an abortion informing the patient that the abortion would terminate the life of a whole, separate, unique, living human being, that the patient had an existing relationship with that unborn human being and that the relationship enjoyed protection under the U.S. Constitution and under the laws of South Dakota, and that by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship would be terminated; the challenged disclosures could be found to violate the First Amendment rights of physicians because it forced them to express a particular ideological viewpoint about abortion and could be found to violate the due process rights of women seeking abortions because the disclosures were far more onerous than what federal courts had previously reviewed, and there was at least a fair chance that they posed an undue burden. *Planned Parenthood Minn. v. Rounds*, 467 F.3d 716, 2006 U.S. App. LEXIS 26914 (8th Cir. S.D. 2006).

By requiring abortion doctors to create a statement in writing that included the state's antiabortion message without a provision allowing the doctor to disassociate himself or herself from the materials, the informed consent provisions of the 2005 amendment to S.D. Codified Laws § 34-23A-10.1 constituted unconstitutional compelled speech, rather than reasonable regulations of the medical profession. *Planned Parenthood v. Rounds*, 375 F. Supp. 2d 881, 2005 U.S. Dist. LEXIS 17202 (June 30, 2005), amended by 2006 U.S. Dist. LEXIS 72778 (D.S.D. Oct. 4, 2006), vacated by, remanded by 530 F.3d 724, 2008 U.S. App. LEXIS 13564 (8th Cir. S.D. 2008)supra.

Constitutional Law: Substantive Due Process: Privacy: Personal Decisions

Suicide advisory under S.D. Codified Laws § 34-23A-10.1(1)(e)(ii) places a substantial obstacle in the path of women seeking abortion and thus violates due process. By compelling untruthful and misleading speech, the advisory also violates doctors' First Amendment right to be free from compelled speech that is untruthful, misleading, or irrelevant. *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662, 2011 U.S. App. LEXIS 18300 (8th Cir. S.D.), vacated, 662 F.3d 1072, 2011 U.S. App. LEXIS 25983 (8th Cir. S.D. 2011).

Governments: Legislation: Vagueness

For purposes of S.D. Codified Laws § 34-23A-10.1(1)(e), "known" means generally recognized, proved, or familiar to all. Since known risks include only generally recognized or familiar risks, a doctor of ordinary intelligence can be reasonably certain how to comply with the statute, which is not void for vagueness. *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662, 2011 U.S. App. LEXIS 18300 (8th Cir. S.D.), vacated, 662 F.3d 1072, 2011 U.S. App. LEXIS 25983 (8th Cir. S.D. 2011).

Healthcare Law: Treatment: End-of-Life Decisions: Abortion: General Overview

S.D. Codified Laws § 34-23A-10.1(1)(c) and (d) require a statement that a woman seeking abortion is legally and constitutionally protected against being forced to have an abortion. Since no one can require a woman to have an abortion, this reading conveys legal information that is truthful, not misleading, and relevant to the abortion decision; the advisories thus construed are valid on their face. *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662, 2011 U.S. App. LEXIS 18300 (8th Cir. S.D.), vacated, 662 F.3d 1072, 2011 U.S. App. LEXIS 25983 (8th Cir. S.D. 2011).

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misleading, or irrelevant. *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662, 2011 U.S. App. LEXIS 18300 (8th Cir. S.D.), vacated, 662 F.3d 1072, 2011 U.S. App. LEXIS 25983 (8th Cir. S.D. 2011).

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South Dakota’s informed consent law, S.D. Codified Laws § 34-23A-10.1(1)(c)-(d), unconstitutionally required doctors to tell pregnant women that having an abortion would terminate their existing relationship with their unborn embryo or fetus because fetuses lacked legal status as “persons,” rendering the statement untruthful and misleading. *Planned Parenthood Minn. v. Rounds*, 650 F. Supp. 2d 972, 2009 U.S. Dist. LEXIS 73970 (D.S.D. 2009), aff’d in part and rev’d in part, 653 F.3d 662, 2011 U.S. App. LEXIS 18300 (8th Cir. S.D. 2011), rev’d, in part, 686 F.3d 889, 2012 U.S. App. LEXIS 15197 (8th Cir. S.D. 2012).

South Dakota’s informed consent law, S.D. Codified Laws § 34-23A-10.1(1)(b), did not unconstitutionally require doctors to tell pregnant women that an abortion would terminate the life of a whole, separate, unique, living human being; however, it did not prohibit a doctor from providing the patient with additional information, including the fact that the term “human being,” as used in the statute, was used in a biological sense, not in an ideological sense. *Planned Parenthood Minn. v. Rounds*, 650 F. Supp. 2d 972, 2009 U.S. Dist. LEXIS 73970 (D.S.D. 2009), aff’d in part and rev’d in part, 653 F.3d 662, 2011 U.S. App. LEXIS 18300 (8th Cir. S.D. 2011), rev’d, in part, 686 F.3d 889, 2012 U.S. App. LEXIS 15197 (8th Cir. S.D. 2012).

Two of the mandatory medical risk disclosures in South Dakota’s informed consent law, S.D. Codified Laws § 34-23A-10.1(1)(e), were unconstitutional: the phrase “statistically significant risk factors” was vague, and the statement that suicide was a known risk of abortion was untruthful and misleading. *Planned Parenthood Minn. v. Rounds*, 650 F. Supp. 2d 972, 2009 U.S. Dist. LEXIS 73970 (D.S.D. 2009), aff’d in part and rev’d in part, 653 F.3d 662, 2011 U.S. App. LEXIS 18300 (8th Cir. S.D. 2011), rev’d, in part, 686 F.3d 889, 2012 U.S. App. LEXIS 15197 (8th Cir. S.D. 2012).

Healthcare Law: Treatment: End-of-Life Decisions: Abortion: Right to Privacy

S.D. Codified Laws § 34-23A-10.1(1)(e)(ii) which required the disclosure to patients seeking abortions of an increased risk of suicide ideation and suicide was constitutional because the suicide advisory was non-misleading and relevant to the patient’s decision to have an abortion. It did not violate First Amendment rights. *Planned Parenthood Minn. v. Rounds*, 686 F.3d 889, 2012 U.S. App. LEXIS 15197 (8th Cir. S.D. 2012).

Healthcare Law: Treatment: Patient Consent: General Overview

By requiring abortion doctors to create a statement in writing that included the state’s antiabortion message without a provision allowing the doctor to disassociate himself or herself from the materials, the informed consent provisions of the 2005 amendment to S.D. Codified Laws § 34-23A-10.1 constituted unconstitutional compelled speech, rather than reasonable regulations of the medical profession. *Planned Parenthood v. Rounds*, 375 F. Supp. 2d 881, 2005 U.S. Dist. LEXIS 17202 (June 30, 2005), amended by 2006 U.S. Dist. LEXIS 72778 (D.S.D. Oct. 4, 2006), vacated by, remanded by 530 F.3d 724, 2008 U.S. App. LEXIS 13564 (8th Cir. S.D. 2008)supra.

Healthcare Law: Treatment: Patient Consent: Informed Consent

S.D. Codified Laws § 34-23A-10.1(1)(e)(ii) which required the disclosure to patients seeking abortions of an increased risk of suicide ideation and suicide was constitutional because the suicide advisory was non-misleading

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and relevant to the patient's decision to have an abortion. It did not violate First Amendment rights. *Planned Parenthood Minn. v. Rounds*, 686 F.3d 889, 2012 U.S. App. LEXIS 15197 (8th Cir. S.D. 2012).

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Research References & Practice Aids

Law Reviews.

58 S.D. L. Rev. 119.

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