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New Mexico legislation and freedom of conscience for health care practitioners

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Introduction

The continuing status of freedom of conscience for health care practitioners in New Mexico is uncertain because of an existing statute governing health care decisions and bills about abortion and assisted suicide being considered by the state legislature.

New Mexico's *Uniform Health-Care Decisions Act* (UHCDA) is modelled on a draft uniform statute of the same name produced in 1993 by the National Conference of Commissioners on Uniform State Laws.[1] Two years later, New Mexico became the first state to enact the law, closely following the original draft.[2,3]

Senate Bill 10 and House Bill 7 (SB10 and HB11), identical proposals called the *Respect New Mexico Women and Families Act*, have both been approved by committees in the state Senate and House.[4,5,6] They would repeal all three provisions in state criminal law pertaining to abortion. The provisions date from 1969 and were significantly modified four years later by the ruling of the U.S. Supreme Court in *Roe v. Wade*.[7] Some news reports have implied that the provisions have been unenforceable since the Supreme Court ruling,[6] but this is not correct.

House Bill 47 (the *Elizabeth Whitfield End-of-Life Options Act*), introduced in the New Mexico house in January, 2021, is an assisted suicide bill.[8] It is intended to permit physicians and advanced practice nurses to provide lethal medication to patients deemed eligible for assisted suicide.

An understanding of the provisions of the statute and proposed bills is necessary to appreciate the implications they have for freedom of conscience for health care practitioners. However, only the UHCDA and the Senate and House bills about abortion are considered here. House Bill 47 is more complex legislation that must be addressed separately.

Uniform Health-Care Decisions Act

The UHCDA was originally drafted as a response to the "confused situation" that developed in relation to end-of-life treatment following the 1990 U.S. Supreme Court decision in *Cruzan v. Commissioner, Missouri Department of Health*.[1,9] However, in its final form, the draft comprehensively addressed

medical decision-making in all circumstances, not just at the end-of-life or in relation to patients lacking capacity.

Scope of New Mexico's UHCDA

New Mexico took this approach in its own UHCDA in 1995.[2] The *Act* applies to "health care practitioners" and "health care institutions," terms defined broadly enough to include physicians, nurses, pharmacists, psychologists, hospitals, hospices, clinics, etc. It defines health care as "any care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual's physical or mental condition." A "health care decision" is "a decision made by an individual or the individual's agent, guardian or surrogate, regarding the individual's health care." Such decisions *include* — this non-restrictive term is important —

> (1) selection and discharge of health-care practitioners and institutions;
>
> (2) approval or disapproval of diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate;
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> (3) directions relating to life-sustaining treatment, including withholding or withdrawing life-sustaining treatment and the termination of life support; and
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> (4) directions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care (emphasis added).

It is thus clear that the UHCDA applies to abortion and would apply to practitioner assisted suicide and euthanasia, should those procedures be legalized. Since the *Act* is intended to ensure compliance with informed medical decisions made by patients or their authorized surrogates, the provisions concerning health care practitioners and institutions unwilling to provide services are especially significant.

UHCDA provisions on refusing to comply with decisions

The *Act* states that health care practitioners and institutions may refuse to act upon instructions or decisions that would require them to provide "medically ineffective health care or health care contrary to generally accepted health-care standards." It further defines "medically ineffective health care" as "treatment that would not offer the patient any significant benefit, as determined by a health-care practitioner" (emphasis added). However, while practitioners and institutions are legally entitled to exercise independent medical judgement in determining whether or not a treatment is effective and beneficial, doing so can be contentious.

In addition, the *Act* states that health care practitioners may refuse to comply with patient instructions or decisions "for reasons of conscience." Similarly, it permits institutions to refuse services or procedures that contradict institutional policies "expressly based on reasons of conscience," provided that patients or their substitute decision-makers are given "timely" notice of the policies.

Obligations of refusing practitioners and institutions

Whether the refusal is for reasons of medical judgement or reasons of conscience, the *Act* imposes three obligations upon practitioners and institutions. The first two are unexceptionable. They must promptly notify patients or their agents of the refusal, and they must continue to provide care pending transfer to another practitioner or institution.

The third obligation is potentially problematic. Refusing practitioners and institutions must "immediately make all reasonable efforts to assist in the transfer of the patient to another health-care practitioner or health-care institution that is willing to comply with the individual instruction or decision," unless the patient refuses assistance.

Making "all reasonable efforts to assist" in transferring patients

No problem arises if this is understood to mean that practitioners and institutions must immediately cooperate in transfers of care initiated by patients or their substitute decision makers. When a patient finds a practitioner or institution willing to provide the contested service and a transfer is requested, objecting practitioners and institutions are typically willing to cooperate by transferring records, cooperate with transportation arrangements, etc. Practitioners and institutions cooperate respectfully with a patient's exercise of autonomy, but do not to help to arrange for or otherwise actively facilitate procedures they refuse to provide for reasons of medical judgement or conscience. In the Project's experience, this arrangement is generally acceptable to objecting practitioners and institutions.

However, a problem would arise if "making all reasonable efforts to assist" is interpreted to require objecting practitioners and institutions to actively and purposefully help the patient find and connect with someone willing to provide a contested service. Many would be unwilling to do this because they reasonably believe that doing so would make them complicit in what they consider to be medically inadvisable or immoral actions.

Which is the correct meaning of the provision, or, at least, the most plausible?

Understanding the obligation to assist

The most plausible interpretation is the first. It appears that 1993 draft UHCDA was understood to to require practitioners and institutions to cooperate in a patient-initiated transfer of care, not to require them to actively help to arrange for the patient to obtain the service from another provider. There is no reason to think that the New Mexico legislature took a different view two years later. This conclusion is warranted for two reasons.

First, official observers of the drafting committee included the Catholic Health Association of the United States (CHAUSA). The Catholic Church in the United States was and continues to be strongly opposed to laws that would compel physicians or institutions to actively support or facilitate services or procedures contrary to Catholic teaching, such as abortion and euthanasia. Had the draft been understood to impose such an obligation, CHAUSA and the United States Conference of Catholic Bishops (USCCB) would most certainly have protested, but they did not. Second, while the

USCCB has been critical of some elements in the UHCDA from the beginning, this is not one of them.[10]

Nonetheless, the most plausible interpretation is unlikely to satisfy activists intent on suppressing freedom of conscience in health care. They are more likely to assert that the UHCDA requires objecting practitioners and institutions to actively facilitate morally contested procedures by referral and other means. This will include abortion if the pending House or Senate bills pass, and assisted suicide, if House Bill 47 is enacted.

Senate Bill 10, House Bill 11: *Respect New Mexico Women and Families Act*

The Senate and House bills are brief and to the point. They are intended to repeal provisions governing abortion in New Mexico's criminal law. Supporters of the bills argue that, as a result of *Roe v. Wade* and subsequent developments, the bills will not affect current medical or legal standards in relation to abortion. If that is the case, one might ask why the bills are important. There appear to be at least two reasons.

First, abortion supporters have expressed fear that the U.S. Supreme Court may reverse or significantly modify *Roe v. Wade*. Should that happen, some or all of the currently unconstitutional elements in New Mexico's abortion law might once more come into force. Repealing the law altogether would prevent that from happening and safeguard current practices. Second, repealing the law would permit suitably trained non-physicians to provide abortions, thus expanding access to the procedure.

A third reason might be suggested: that leaving unconstitutional laws on the books serves no purpose and only invites confusion. Laws that have become dead letters by virtue of court rulings and subsequent developments should be repealed, not fossilized in the statute book. This makes sense, but it does not apply in this case.

New Mexico's abortion law

It does not apply because *Roe v. Wade* did not strike down the whole of New Mexico's abortion law, which consists of three sections:

Section 30-5-1: Definitions

Section 30-5-2: Persons and institutions exempt

Section 30-5-3: Criminal abortion

Roe v. Wade affected only the first and third sections, which had restricted abortion. These sections remain in force to the extent that they allow only physicians to provide abortions and prohibit abortions performed on women who have not consented to the procedure. The principal effect of repealing them would be to enable non-physicians to provide abortions. It is unlikely that repeal would diminish safeguards against coerced abortion, since that would continue to be a criminal

offence (assault), a disciplinary offence (medical malpractice) and actionable in civil law. Repeal of these sections would not be an issue from the perspective of practitioner or institutional freedom of conscience. Indeed, expanding the pool of abortion providers beyond physicians might actually relieve some of the pressure now often applied to compel them to participate.

Protection of conscience

However, the second section of the abortion law was wholly unaffected by *Roe v. Wade* and remains fully enforceable.

> **Section 30-5-2: Persons and institutions exempt**: This article does not require a hospital to admit any patient for the purposes of performing an abortion, nor is any hospital required to create a special hospital board. A person who is a member of, or associated with, the staff of a hospital, or any employee of a hospital, in which a justified medical termination has been authorized and who objects to the justified medical termination on moral or religious grounds shall not be required to participate in medical procedures which will result in the termination of pregnancy, and the refusal of any such person to participate shall not form the basis of any disciplinary or other recriminatory action against such person.

The reference to "justified" and "authorized" abortions pertains to the 1969 regulatory regime struck down by *Roe v. Wade*. Assuming that all abortions performed by physicians in New Mexico would now seem to be legally "justified" and "authorized," this section prevents hospital staff and employees from being compelled to participate in the procedures and protects them from being punished or disadvantaged if they refuse. Certainly, the section could be amended to make the protection more effective. However, repealing it would abolish what appears to be the only statutory protection available for New Mexico practitioners unwilling to participate in abortion for reasons of conscience.

Relevance of the UHCDA

Further, supporters of SB10 and HB11 have argued that New Mexico's *Uniform Health-Care Decisions Act* should be the standard applied to all medical decision-making, including decisions about abortion, so it seems likely that, if either SB10 or HB11 were to pass, they would cite the UHCDA in a campaign to compel objecting physicians and institutions to refer for abortion. Similarly, activists would likely demand referral for assisted suicide were House Bill 47 to pass.

Notes

1. National Conference of Commissioners on Uniform State Laws. Uniform Health-Care Decisions Act [Internet]. Chicago, Illinois: Uniform Law Commission; 1993 Jul 30-Aug 6 [cited 2021 Feb 13]. Available from: https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=ecc54f21-ed44-3b22-7350-4b4861e751c9&forceDialog=1.

2. *P. & a.v. Presbyterian Healthcare Services*, 989 P (2d) 890, 128 NM 73, 1999-NMCA-122, (1999). Justia [Internet]. Mountainview, California; 2021 [cited 2021 Feb 13]. Available from: https://law.justia.com/cases/new-mexico/court-of-appeals/1999/20-385-2.html.

3. The Portal of Geriatrics On-line Education: Geriatric Medicine- Health Care Decision Making [Internet]. Nashville, TN: Icahn School of Medicine at Mount Sinai and Vanderbilt University School of Medicine. [cited 2021 Feb 13]. Available from: https://pogoe.org/sites/default/files/health_care_decision_making_module.pdf.

4. US, SB 10, An Act Repealing Sections 30-5-1 through 30-5-3 NMSA 1978 (Being Laws 1969, Chapter 67, Sections 1 through 3), 55th Legislature, First Session, NM, 2021 [Internet]. Santa Fe, NM: New Mexico Legislature; 2021 [cited 2021 Feb 13]. Available from: https://www.nmlegis.gov/Sessions/21%20Regular/bills/senate/SB0010.pdf.

5. US, HB 7, An Act Repealing Sections 30-5-1 through 30-5-3 NMSA 1978 (Being Laws 1969, Chapter 67, Sections 1 through 3), 55th Legislature, First Session, NM, 2021 [Internet]. Santa Fe, NM: New Mexico Legislature; 2021 [cited 2021 Feb 13]. Available from: https://www.nmlegis.gov/Sessions/21%20Regular/bills/house/HB0007.pdf.

6. Susan Dunlap. Bill to decriminalize abortion passes House committee. The NM Political Report [Internet]. 2021 Jan 28 [cited 2021 Feb 13]. Available from: https://nmpoliticalreport.com/2021/01/28/bill-to-decriminalize-abortion-passes-house-committee-hurdle-wednesday/.

7. *Roe v. Wade*, 410 US 113 (US 1973). Justia [Internet]. Mountainview, California; 2021 [cited 2021 Feb 13]. Available from: https://supreme.justia.com/cases/federal/us/410/113/.

8. US, HB 47, An Act Relating to Health Care; Enacting the Elizabeth Whitefield End-of-Life Options Act; Amending a Section of Chapter 30, Article 2 NMSA 1978 to Establish Rights, Procedures and Protections Relating to Medical Aid in Dying; Establishing REporting Requirements; Removing Criminal Liablity for Providing Assistance Pursuant to the Elizabeth Whitefield End-of-Life Options Act., 55th Legislature, First Session, NM, 2021 [Internet]. Santa Fe, NM: New Mexico Legislature; 2021 [cited 2021 Feb 15]. Available from: https://www.nmlegis.gov/Sessions/21%20Regular/bills/house/HB0047.pdf.

9. *Cruzan v. Commissioner, Missouri Department of Health*, 497 US 261 (US 1990). Justia [Internet]. Mountainview, California; 2021 [cited 2021 Feb 13]. Available from: https://supreme.justia.com/cases/federal/us/497/261/.

10. Anthony R. Picarello, Jr., Michael F. Moses. (Office of the General Counsel, United States Conference of Catholic Bishops, Washington, DC). Letter to: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Washington, DC) [Internet]. Washington, DC: United States Conference of Catholic Bishops; 2015 Sep 4 [cited 2021 Feb 13]. Available

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https://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Advance-Directives-Medicare-9-15.pdf.