

POLICY INVESTIGATIONS OF ALLEGED VIOLATIONS OF A.R.S. § 36-2153(D)

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- I. PURPOSE: To establish the investigative process for complaints alleging a violation of A.R.S. § 36-2153(D), which prohibits requiring or obtaining payment for a service provided to a patient who inquires about or schedules an abortion until expiration of "the 24 hour reflection period required by [A.R.S. § 36-2153(A)]."
- II. POLICY: Absent a court order directing otherwise, Medical Board Staff, in the exercise of its prosecutorial discretion, will only investigate complaints against a physician under A.R.S. § 36-2153(D) that allege, at a minimum, that the physician required or obtained payment for an abortion-related service from a patient before the expiration of 24 hours from the date and time the patient received the information in A.R.S. § 36-2153(A), also known as the informed consent counseling. For purposes of this policy, "abortion-related service" includes informed consent counseling, as prescribed by A.R.S. 36-2153(A), and an abortion, as defined in A.R.S. § 36-2151(1), but does not include services unrelated to an abortion that may have been offered during the same consultation with the physician, including contraceptive counseling and services, testing and treatment of sexually transmitted infections, and cancer screenings. To that end, a complaint must include at least the following information: (1) The date and time the woman received the information in A.R.S. § 36-2153(A); (2) The date and time the abortion was performed or scheduled to be performed; and (3) The date the physician required or obtained payment for the relevant abortion-related service.
- III. BACKGROUND:

On or about September 14, 2009, two lawsuits challenging the constitutionality of various newly enacted statutory provisions that restrict abortion were filed. One was filed in state court (*Planned Parenthood Arizona, Inc. v. Terry Goddard, et al.*, Complaint No. CV2009-029110), and claims that certain statutory provisions violate the state constitution. The other was filed in federal district court (*Tucson Women's Center et al. v. Arizona Medical Board, et al.*, Amended Complaint No. CV09-1909-PHX-DGC), and claims that many of the same statutory provisions violate the federal constitution. Both lawsuits asked that the provisions be permanently enjoined, and that the courts also preliminarily enjoin the law while the cases are completed. Separate hearings in state and federal court were held on September 29, 2009, on the state and federal plaintiffs' separate motions for preliminary injunction.

The federal court denied the federal plaintiffs' request for preliminary injunction, holding that the federal plaintiffs were unlikely to succeed in their challenge on federal constitutional grounds. The state court granted the state plaintiffs' request for preliminary injunction, holding that the state plaintiffs were likely to succeed in their challenge on state constitutional grounds.

The federal plaintiffs, some of whom are physicians, are concerned that, amongst other matters, they face the possibility of disciplinary sanctions under, yet lack guidance about how to comply with, the new "payment provision," A.R.S. § 36-2153(D). That provision states:

D. A person shall not . . . require or obtain payment for a service provided to a patient who has inquired about an abortion or scheduled an abortion until the expiration of the twenty-four hour reflection period required by Subsection A.<sup>1</sup>

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<sup>1</sup> Subsection A provides that, before an abortion can be performed, a woman must at least twenty-four hours before the abortion, be given certain information, which includes but is not limited to: the name of the physician who will perform the abortion, the nature of the proposed procedure, the medical risks associated with the procedure, alternatives to the procedure, the probable gestational age of the fetus, and the probable anatomical and physiological characteristics of the fetus.

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The federal (and state) plaintiffs allege that this provision is so vague that it could require a physician providing a non-abortion-related service to indefinitely refrain from charging for that service if the patient makes a casual inquiry about abortion. On behalf of the Medical Board, the Attorney General's Office argued to the federal court in the preliminary injunction proceedings that the payment provision in subsection D is limited to the abortion context where the informed consent/24-hour waiting period prescribed by subsection A is triggered. The federal court held that the Medical Board's interpretation was "probably correct," but nonetheless certified the question of the proper interpretation of A.R.S. § 36-2153(D) to the Arizona Supreme Court.

Medical Board staff is implementing this policy to provide guidance to Medical Board personnel when processing complaints under A.R.S. § 36-2153(D).

IV. PROCEDURE:

- A. When a complaint is received alleging that a physician has violated A.R.S. § 36-2153(D) by requiring or obtaining "payment for a service provided to a patient who has inquired about an abortion or scheduled an abortion [prior to] the expiration of the 24 hour waiting period required by A.R.S. § 36-2153(A)," the Intake Personnel will review the complaint to determine if, at a minimum, it specifies or alleges the following:
  - (1) The date and time the woman received the information in A.R.S. § 36-2153(A).
  - (2) The date and time the physician required or obtained payment for an abortion-related service or services allegedly in violation of A.R.S. § 36-2153(D).
  - (3) A description of the abortion-related service(s) for which payment was required or obtained.
- B. If the Intake Personnel determine that the complaint contains the information in paragraph (A)(1) – (3) above and that it appears the physician required or obtained payment for an abortion-related service before the expiration of the 24 hours following an informed consent counseling session received pursuant to A.R.S. 36-2153(A), the Intake Personnel will forward the complaint to the Investigations Unit for further review.

If Intake Personnel determine that, the complaint does not contain sufficient information to open a case the Intake Personnel will send the complaint for further review to the Chief Medical Consultant and the Investigations Manager to determine whether an investigation should be opened. If the secondary review of the complaint concludes there is insufficient information to proceed with an investigation, a do not open letter will be sent to the complainant requesting that he or she provide further information pursuant to paragraph IV(A) (1)-(3) above.



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