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MEMORANDUM

February 6, 2005

TO: Michael Lawrence and Timothy Dore

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2005-2006 #80, concerning late-term abortion-limiting initiative

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

An earlier version of this initiative was the subject of two previous memorandums dated August 10, 2005, and August 29, 2005. Proposal 2005-2006 #48 was discussed at a hearing on August 12, 2005 and Proposal 2005-2006 #49 was discussed at a hearing on August 31, 2005. The comments and questions raised in this memorandum will be limited so as not to duplicate comments and questions that were addressed at earlier hearings unless it is necessary to fully address the issues in the revised measure. However, the comments and questions that have not been addressed by changes in the proposal continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendment appear to be:

1. To define "abortion" as the use of any means to terminate a person's pregnancy with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the person's unborn offspring.
2. To define "viable fetus" as a fetus that has attained that stage of fetal development when its life may be continued indefinitely outside the womb by natural or artificial life-supportive systems.
3. To define "medical emergency" as a condition that, on the basis of a physician's good-faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate a medical procedure to prevent the woman's death or for which a delay will create a serious risk of substantial and irreversible impairment of a major bodily function.
4. To make it a class 4 felony to knowingly perform an abortion of a viable fetus or perform an abortion of a viable fetus with reckless disregard for whether the fetus is viable or not.
5. To create an affirmative defense to performing an abortion on a viable fetus if the person performed the abortion on a viable fetus based on a documented medical emergency.
6. To require a person who is to perform the abortion to use his or her good-faith clinical judgment to determine before the abortion whether the fetus is a viable fetus.
7. To require a person who is to perform an abortion to document the basis for his or her good-faith clinical judgment that the fetus is viable or not.
8. To state that when a woman pregnant with a viable fetus has a medical emergency, the physician treating her must try to protect the life of the fetus.
9. To establish that, when a medical emergency makes termination of a pregnancy an advisable treatment for the medical emergency, a second physician is required to be in attendance to care for the fetus.
10. To require a pregnant woman's physician to use the pregnancy-terminating medical procedure, whether it is inducement of vaginal delivery, caesarian section, abortion, or another pregnancy-terminating medical procedure, that provides the best opportunity for fetal survival.
11. To establish that a pregnant woman's physician will not have to use the pregnancy-terminating procedure that provides the best opportunity for fetal survival over other

pregnancy-terminating medical procedures if such a procedure poses a significantly greater risk of the pregnant woman's death or the substantial and irreversible impairment of a major bodily function.

12. To make it a class 1 misdemeanor to knowingly perform an abortion in violation of the provision described in number 8, 9, or 10 or perform an abortion in reckless disregard of the provision described in number 8, 9, or 10.
13. To require a physician to file a report of each abortion performed on a viable fetus to the department of public health and environment within 30 days of the abortion on forms prescribed by the department. To prevent the reports from identifying the patient's name but to require the following information:
 - a. Identification of the physician who performed the abortion, the facility where the abortion was performed, and the referring physician, agency, or service, if any;
 - b. The county and state in which the patient resides;
 - c. The patient's age;
 - d. The number of prior pregnancies and prior abortions experienced by the patient;
 - e. The gestational age of the unborn child at the time of the abortion;
 - f. The type of procedure performed and the date of the abortion;
 - g. Preexisting medical conditions of the patient which would complicate the pregnancy, if any, and, if known, any medical complication which resulted from the abortion itself;
 - h. The basis for the medical judgment of the physician who performed the abortion that the abortion was necessary to prevent either the death of the pregnant patient or the substantial and irreversible impairment of a major bodily function of the patient, when an abortion has been performed by a physician who determined a medical emergency existed;
 - i. The weight of the aborted fetus; and
 - j. The basis by which the physician performing the abortion determined the gestational age of the fetus.
14. To establish a penalty of \$100 a day for each day and each report when a physician fails to comply with the reporting requirements and an abortion report remains due but unfilled.
15. To require every facility in the state of Colorado in which an abortion of a viable fetus is

performed to file a quarterly report within 30 days after the quarter ends showing the total number of abortions on viable fetuses performed within the facility during that quarter year.

16. To establish a penalty of \$100 per day for a facility that is late in filing an abortion report.
17. To require a facility to file the abortion report on a form prescribed by the department of public health and environment.
18. To require facility abortion report to be available for public inspection and copying.
19. To establish that, if any provisions of the initiative are held to be unconstitutional, the unconstitutionality of the provisions will not affect the constitutionality of the remaining provisions.
20. To establish that the article will take effect on January 1, 2007, and apply to offenses committed on or after said date.

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical questions:

1. In subsection (6) of proposed section 12-37.3-102, the proposed language uses the term "MUST" as a means of making the requirement mandatory. It is standard drafting practice to use the term "shall" to indicate a mandatory requirement. Would the proponents consider changing the term "MUST" to "SHALL"?
2. In subsection (7) of proposed section 12-37.3-102, the proposed language uses the term "WILL NOT" as a means of indicating the previous subsection does not need to be complied with under the circumstances described in subsection (7). It is standard drafting practice to use the term "SHALL NOT" in the situation described. Would the proponents consider changing "WILL NOT" to "SHALL NOT" in subsection (7) of proposed section 12-37.3-102?

Substantive questions:

1. The proposed initiative would make knowingly performing an abortion in violation of subsection (6) of the proposed section 12-37.3-102 and performing an abortion in reckless disregard for the provisions of subsection (6) of the proposed section 12-37.3-102 a class 1 misdemeanor. The first sentence of subsection (6) of the proposed section 12-37.3-102

states "When a woman pregnant with a viable fetus has a medical emergency, the physician treating her must try to protect the life of the fetus". Such a person who knowingly performed an abortion in violation of that sentence or performed an abortion with reckless disregard for that sentence would be subject to criminal prosecution. In order to subject a person to criminal culpability, the statute must not be vague or overbroad. The sentence that begins subsection (6) of the proposed section 12-37.3-102 could be interpreted as either vague or applying to too many situations to actually create criminal culpability.

- a. Do the proponents intend for a person to be subject to criminal liability based on the first sentence of subsection (6) of the proposed section 12-37.3-102? If so, do the proponents think the sentence is sufficiently narrow to avoid being declared unconstitutional on vagueness or overbreadth concerns?
 - b. If the proponents do not intend for a person to be subject to criminal liability based on the first sentence of subsection (6) of the proposed section 12-37.3-102, would the proponents consider either removing the sentence from the proposed initiative or placing it in a stand-alone provision that would not include the possibility of criminal culpability?
 - c. Would the proponents consider specifying more clearly how a person may violate subsection (6)?
2. The last sentence of subsection (6) of the proposed section 12-37.3-102, states "The pregnant woman's physician must use the pregnancy-terminating medical procedure, whether the inducement of vaginal delivery, caesarian section, abortion, or other pregnancy-terminating medical procedure, that provides the best opportunity for fetal survival". Subsection (8) of the proposed section 12-37.3-102 subjects the physician to criminal liability if he or she knowingly performs an abortion in violation of that provision or perform an abortion with reckless disregard for that provision. Subsection (7) of the proposed section 12-37.3-102 states "The pregnant woman's physician will not have to use the pregnancy-terminating procedure that provides the best opportunity for fetal survival over other pregnancy-terminating medical procedures if such a procedure poses a significantly greater risk of the pregnant woman's death or the substantial and irreversible impairment of major bodily function".
- a. Do the proponents intend for subsection (7) of the proposed section 12-37.3-102 to eliminate criminal liability for the physician under subsection (8) of the proposed section 12-37.3-102? If so, is the provision in subsection (7) of the proposed section 12-37.3-102, intended to be an affirmative defense or to preclude the filing of criminal charges? Would the proponents consider clarifying the intent of subsection (7) of the proposed section 12-37.3-102.
3. Subsection (8) of the proposed section 12-37.3-102 criminalizes a violation of subsection (6), whether the actor acts knowingly or with reckless disregard. This is referred to as the level

of culpability. Any violation of subsection (6) is a class 1 misdemeanor, even though acting "knowingly" is a higher level of culpability than acting with "reckless disregard". Under section 18-1-503, C.R.S., if a crime requires that a person act "recklessly", that element of the crime is proven if the person acts recklessly, knowingly, or intentionally. Thus, the crime need only require the lower level of culpability and it will apply in cases where a person acts with a higher level of culpability. Generally, a statute would state multiple levels of culpability only if the higher level of culpability received a higher level of punishment. Would the proponents consider removing the reference to "knowingly" in subsection (8) of the proposed section 12-37.3-102? Or would the proponents prefer a higher penalty for a person who acts knowingly to violate the law, as opposed to one who acts with reckless disregard as to whether he/she is violating the law?