



2009 State Legislative Sessions in Review

OVERVIEW

Despite Congress and the Obama Administration's pursuit of an incremental strategy to implement a regime of unregulated and unrestricted abortion-on-demand, fund unethical and destructive biotechnologies, and coerce and undermine the consciences of health care providers, the majority of states continue their pursuit of life-affirming laws and policies.

In 2009, approximately 60 pro-life measures¹ were enacted in the states, a marked increase from 2008. This accomplishment is especially notable given that there was a nearly one-third decline in the number of pro-life measures introduced in the states in 2009 (as compared to 2008 activity levels).

Several notable and promising developments and trends also emerged in 2009:

- 1) The states considered approximately 300 abortion-related measures, the vast majority of them life-affirming, and virtually every state considered at least one pro-life measure.
- 2) Several states introduced resolutions opposing the federal Freedom of Choice Act (FOCA), a radical piece of legislation that would enshrine abortion-on-demand into American law and override all federal and state laws regulating or restricting abortion. Meanwhile, attempts in five states to enact state versions of FOCA were handily defeated.
- 3) Informed consent, ultrasound requirements, enhanced parental involvement requirements, and comprehensive health and safety regulations for abortion clinics continued to receive significant attention in the states.
- 4) States continued to seek to protect the unborn in contexts other than abortion by enacting protections for unborn victims of violence, encouraging substance-abuse treatment for pregnant

¹ This figure does not include measures related to advance directives for health care and similar documents which may include both pro-life and anti-life components.

- woman, and providing legal recourse for families whose unborn children are killed through the criminal acts or neglect of others.
- 5) Measures to regulate biotechnologies and to prohibit or restrict technologies that destroy nascent life increased by nearly 20 percent – the first increase in such legislation in three years.
 - 6) Legislation to protect health care providers' freedom of conscience declined by 50 percent. However, for the first time in three years, measures to protect conscience outpaced measure to violate or compel conscience by a margin of 2 to 1.
 - 7) States legislation on end of life issues doubled from 2008 activity levels.

These life-affirming trends – especially during an economic crisis – bode well for the 2010 state legislative sessions and the continuing pursuit of a renewed Culture of Life.

ABORTION

In 2009, the states considered approximately 300 measures related to abortion, a decrease of 33 percent from 2008 levels. However, this decrease was less than that expected, given state legislatures' understandable focus on economic and budgetary issues.

Constitutional Amendments

A small number of states, including Missouri, New Jersey, Tennessee, and West Virginia, considered measures declaring that their state constitutions do not encompass a right to abortion and/or a right to state taxpayer funding of abortion. Tennessee's measure carries over to 2010.

Legislative Resolutions

At least nine states – Alabama, Georgia, Illinois, Missouri, Montana, Nebraska, North Dakota, Ohio, and Oklahoma – considered resolutions opposing the federal Freedom of Choice Act. An AUL-drafted resolution was passed by the Missouri House of Representatives and by both chambers in Oklahoma.

Statutory Redefinitions – Medical Emergency Exceptions

At few states including Alaska and Arizona considered legislation to modify – and in most cases limit – their definition of “medical emergency” in abortion-related laws.

Abortion Bans

Comprehensive Abortion Bans

At least two states – Alabama and Georgia – considered sweeping bans on abortion.

Partial-Birth Abortion Bans

At least eight states including Arizona, Arkansas, Hawaii, Kansas, Kentucky, and Michigan considered measures to ban partial-birth abortion.

Arizona and Arkansas enacted bans on the procedure, while Kansas Gov. Kathleen Sebelius vetoed a similar measure in April 2009.

Post-Viability Abortions

At least four states including Kansas and Utah considered measures related to post-viability abortion.

Utah enacted a measure prohibiting post-viability abortions except in cases of life endangerment, “serious risk of substantial and irreversible impairment of a major bodily function,” severe fetal abnormality as certified by two physicians, or rape or incest reported to the police. Performing a prohibited abortion is now a felony.

Conversely, Kansas Gov. Sebelius vetoed a measure modifying the state’s definition of “viability” to the point at which a child can survive with or without medical intervention (as opposed to the current law which provides that viability is attained when the child can survive without the application of “extraordinary measures”).

Saline Abortions

Minnesota considered a ban on saline abortions.

Sex-Selective Abortions

At least five states including Michigan, Minnesota, Mississippi, Oklahoma, and West Virginia considered measures to ban abortions performed for sex selection. Oklahoma became the third state to enact such a ban.

“Personhood” Legislation

A small number of states including Georgia, Maryland, Montana, North Dakota, and Virginia considered constitutional amendments or other measures to define unborn children from the moment of conception as “persons” under state laws or to provide the unborn “equal rights and protections” under the state’s Constitution and laws. A primary intent of such legislation is to ban abortion.

Abortion Alternatives

Despite budgetary shortfalls, a number of states considered measures to fund the life-affirming work of pregnancy care centers (PCCs).

Direct Funding of PCCs

At least 13 states including Kansas, Louisiana, Missouri, North Dakota, Oklahoma, Pennsylvania, Texas, and Wisconsin considered measures providing direct taxpayer subsidies to PCCs.

The Louisiana legislature allocated \$1.5 million to PCCs.

Missouri’s budget allocates \$2 million to provide “alternatives-to-abortion services” for any pregnant woman at or below 200% of the federal poverty level. The program will offer a range of services to a woman during her pregnancy and for one year following birth.

North Dakota, Oklahoma, and Texas also allocated state funds to PCCs, and Wisconsin’s annual budget provides \$154,000 to organizations providing “alternatives-to-abortion.”

Meanwhile, Kansas Gov. Mark Patterson eliminated \$355,000 allocated by the legislature for PCCs.

Funding Through “Choose Life” License Plates

At least seven states including Louisiana, Missouri, North Carolina, Texas, and Virginia considered measures to approve “Choose Life” license plate programs that provide earned revenue to PCCs. In March 2009, Virginia approved its “Choose Life” program.

Pro-PCC Resolution

Kentucky considered a resolution commending the work of PCCs.

Regulation of PCCs

At least four states – Michigan, New York, Texas, and West Virginia – considered measures to regulate PCCs.

Abortion Funding

In 2009, legislation and issues related to the use of state taxpayer funding for abortion were debated in a number of states.

State Funding for Abortions

At least eight states including Iowa, Maryland, Minnesota, Tennessee, Virginia, and West Virginia considered measures related to the use of state funding (including Medicaid funding) for abortions.

Iowa, Maryland, and Minnesota reauthorized their existing permissive funding policies.

Prohibition on the Use of State Funding for Abortion Counseling or Referrals

A few states including Minnesota and West Virginia considered measures to prohibit the use of state funding for abortion counseling or referrals.

Prohibition of the Use of State Facilities and Employees for Abortions

A small number of states including Rhode Island and West Virginia considered measures to prohibit the use of state facilities (such as state-run hospitals) or state employees for the provision of abortions.

Prohibition on Use of State Education Funding for Abortions

A few states including Virginia and West Virginia considered measures to prohibit or limit the use of funding slated for education (including funding for state universities) for abortions.

Prohibitions on Use of State Family Planning Funding for Abortions

At least nine states including Colorado, Kansas, Michigan, Tennessee, Texas, and Virginia considered measures prohibiting the use of state family planning funding to provide or promote abortion.

Colorado reenacted a long-standing restriction prohibiting those who perform abortions from receiving state family planning funding.

Texas again approved a state budget measure requiring that recipients of state family planning funding segregate their family planning services from abortion services, maintaining separate incorporation, governing structure, facilities, and funding sources.

Meanwhile in Kansas, Gov. Sebelius vetoed language in the state's budget bill that would have required family planning funds be dispersed on a priority-based system. The system would have effectively excluded abortion providers like Planned Parenthood.

Insurance Coverage

At least four states including California, New York, and Oklahoma introduced measures related to private insurance coverage of abortion. Similarly, at least two states – North Carolina and West Virginia – considered limits on the use of taxpayer funding to purchase health insurance (that includes coverage for abortions) for state employees.

Informed Consent

At least 16 states including Arizona, California, Connecticut, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Mississippi, Missouri, Nebraska, New York, North Dakota, Rhode Island, Tennessee, and Texas considered measures requiring informed consent for abortion or modifying existing requirements.

Arizona enacted legislation requiring informed consent and a 24-hour reflection period before an abortion. Under the new law, a woman must receive information about the nature of the procedure, the immediate and long-term risks of abortion, the risks of childbirth, alternatives to the procedure, and the probable gestational age and anatomical and physiological characteristics of the unborn child. A woman must also receive information about medical assistance benefits, the father's liability for child support, and public and private agencies available to assist her.

Kansas enacted a measure expanding the requirements for the written materials abortion providers give to women considering abortion. The materials must now include contact information for perinatal hospices and a list of organizations that provide free ultrasound examinations. Abortion providers must also inform women that the state-mandated written materials are also available online.

North Dakota enacted a measure requiring that abortion providers inform women that abortion ends the life of a "whole, separate, unique human being," while Kansas Gov. Sebelius vetoed a similar measure.

Notably, a number of states considered informed-consent enhancements such as coerced abortion prevention, counseling on fetal pain, and ultrasound requirements.

Coerced-Abortion Prevention

At least 12 states including Arizona, Kansas, Michigan, Minnesota, Missouri, North Dakota, Ohio, Rhode Island, and Texas considered measures to prevent women from being coerced into having abortions. Typically, these bills required abortion providers to inform or counsel women on coercion and the protective services available to them. Some also criminalized coercive behavior.

Arizona enacted an omnibus measure that included a requirement that abortion providers personally inform women that they may not be coerced into an abortion.

Kansas enacted a measure requiring abortion providers to post signs indicating that no one may coerce a woman into an abortion, that an abortion requires a woman's voluntary consent, and that a woman may report coercive behavior to law enforcement.

North Dakota enacted a measure requiring abortion clinics to prominently display signs with the following statement: "No one can force you to have an abortion. It is against the law for a spouse, a boyfriend, a parent, a friend, a medical care provider, or any other person to in any way force you to have an abortion."

Similarly, Ohio enacted a measure requiring that abortion clinics post signs stating that no one may coerce a woman into having an abortion and encouraging any woman who feels that she is being coerced to discuss it with the clinic staff.

Fetal Pain

At least seven states including Alaska, Indiana, Missouri, New York, and Utah considered measures to require medical personnel to counsel women on the pain an unborn child may feel during an abortion.

Utah enacted a measure requiring abortion providers to offer a woman seeking an abortion at 20 weeks' gestation or later anesthesia for the unborn child.

Ultrasound Requirements

At least 22 states including Alabama, Connecticut, Florida, Illinois, Kansas, Kentucky, Maryland, Nebraska, New Jersey, North Carolina, North Dakota, Rhode Island, South Carolina, Texas, Utah, Virginia, West Virginia, and Wyoming considered ultrasound requirements.

Kansas and North Dakota enacted measures requiring that before an abortion, the abortion provider must offer a woman the opportunity to undergo an ultrasound and to hear the fetal heartbeat.

Nebraska enacted a law requiring abortion providers, when they perform an ultrasound prior to an abortion, to display the image so the woman can see it and to answer any questions the woman has about the ultrasound. The provider must

also offer the woman a list of organizations that perform ultrasound examinations as part of abortion counseling.

Further, at least three states introduced measures to restrict the non-medical use of ultrasounds. Connecticut enacted a measure requiring that all ultrasounds be ordered by a physician and performed for a “medical purpose.”

Paternal Consent/Spousal Involvement

Ohio considered a measure requiring “paternal consent” for an abortion, while West Virginia again considered a measure requiring spousal consent.

Parental Involvement

In 2009, parental involvement for abortion – either parental consent or notice – continued to be actively debated in a number of state legislatures.

Parental Consent

At least ten states, including Alaska, Arizona, Massachusetts, New York, North Carolina, Rhode Island, Virginia, and West Virginia, considered measures to require parental consent for abortion or to modify existing consent requirements.

Arizona amended its law to require notarization of a parent’s written informed consent. The legislature also established evidentiary standards for judicial bypass hearings when a minor is seeking to have the consent requirement waived. Finally, it also prohibited a parent from refusing financial support as a means to coerce a daughter into having an abortion.

Parental Notice

At least 11 states including Connecticut, Delaware, Florida, Hawaii, Iowa, Montana, New Hampshire, New Mexico, and New York introduced measures to require parental notice for abortion or to amend existing notification requirements.

Provider Requirements

Abortion Clinic Regulations

At least eight states, including Minnesota, Montana, Tennessee, Texas, Virginia, and West Virginia, considered health and safety regulations for abortion clinics. Some of these measures included abortion-specific regulatory schemes, while others sought to regulate abortion clinics as “ambulatory surgical centers.”

Admitting Privileges and Licensing Requirements

At least three states – Indiana, Virginia, and West Virginia – considered measures to require abortion providers to have hospital admitting privileges.

Physician-Only Requirements for Abortion

At least four states including Arizona, Nevada, Minnesota, and West Virginia considered measures to limit the performance of abortions to licensed physicians or to certain categories of physicians. Arizona enacted a measure limiting the performance of surgical abortions to physicians, and Nevada enacted measures prohibiting “osteopathic medical professionals” and chiropractic physicians from performing abortions.

West Virginia considered a measure precluding any one “who has admitted to committing or has been adjudicated as having committed medical malpractice” from performing abortions.

Reporting Requirements

At least 12 states including Iowa, Kansas, Michigan, Mississippi, Missouri, Oklahoma, West Virginia, and Wyoming considered measures mandating the reporting of demographic and other information related to abortion to state agencies (typically, the state Department of Health).

Oklahoma enacted a measure expanding the requirements of its existing reporting law. Meanwhile, the Kansas legislature failed to override Gov. Sebelius’ veto of specific reporting requirements for post-viability abortions. The measure would have required specific information on the diagnosis necessitating the late-term abortion and a certification that the abortion was, in fact, medically necessary.

Sexual Abuse Reporting Requirements

At least five states including Mississippi and Pennsylvania introduced measures to strengthen or clarify existing sexual abuse reporting requirements. For example, Mississippi considered the AUL-developed Child Protection Act, a comprehensive measure requiring the reporting of all suspicions of sexual abuse by designated individuals including all employees of and volunteers in abortion clinics; mandating the retention of evidentiary samples; and creating a civil cause of action against anyone who takes a minor across state lines to circumvent the home state's parental involvement law.

Abortion Litigation Fund

Utah enacted a measure providing for a litigation fund to be used to pay for the legal defense of the state's abortion-related restrictions, if needed.

State “Freedom of Choice Acts”

At least five states including Illinois, Minnesota, New Mexico, New York, and Rhode Island considered state versions of the federal Freedom of Choice Act, providing for an unrestricted state right to abortion and abolishing any existing regulations of or restrictions on abortion.

Ensuring Access to Abortion Clinics

At least four states including Delaware, Montana, New York, and Rhode Island considered measures to create so-called “bubble zones” around abortion clinics – areas where clinic demonstrators may not enter – and to criminalize actions that inhibit access to clinics.

Training Abortion Providers

New York considered a measure to require medical residency training in obstetrics, gynecology, internal medicine, women's health, and osteopathy to include training in induced abortion and its complications.

CONTRACEPTION AND “EMERGENCY CONTRACEPTION”

In 2009, 25 states considered more than 60 measures related to contraception. The vast majority of the measures sought to expand access to both contraceptives and so-called “emergency contraception” or Plan B.

Definition of Contraception

A small number of states including Alabama, Arizona, Colorado, and Virginia considered measures classifying or defining “contraception.” Alabama and Arizona considered measures to exempt FDA-approved contraception from the state’s “abortion” definition and from compliance with the abortion-related laws such as informed consent and parental involvement.

Colorado enacted a measure defining “contraception” as “a medically acceptable drug, device, or procedure used to prevent pregnancy” and “emergency contraception” as “a drug approved by the Federal Food and Drug Administration that prevents pregnancy after intercourse, including but not limited to oral contraceptive pills.” The measure exempts “mifepristone (RU-486) and any other drug or device that induces a medical abortion” from the definition of “contraception.”

Contraceptive Coverage

Insurance Mandates

At least nine states including Illinois, Kentucky, Michigan, New York, Oklahoma, Pennsylvania, South Dakota, and Wisconsin considered measures to require insurance coverage of contraceptives. Wisconsin enacted a coverage mandate.

Minors’ Access

At least four states – Mississippi, Montana, Texas, and West Virginia – considered measures expanding insurance coverage for contraception for minors. Conversely, at least three states – Georgia, Pennsylvania, and Texas – considered measures requiring parental involvement for minors seeking contraception.

Contraception Information in Schools

North Carolina enacted a measure requiring “medically accurate information” about contraception and “reproductive health” in educational programs for middle school students.

“Emergency Contraception”

The most significant area of legislative activity related to contraceptives involved access to so-called “emergency contraception” or Plan B. At least 14 states considered such measures. This level of activity mirrored what we have seen over the past few years.

Informed Consent for “Emergency Contraception”

Texas considered a measure mandating informed consent for and the provision of certain medical and safety information to anyone receiving “emergency contraception.”

Emergency Room Access

At least ten states – Arkansas, Hawaii, Michigan, Missouri, Oklahoma, Pennsylvania, Texas, Utah, Virginia, and West Virginia – considered measures to expand emergency room access to “emergency contraception” or Plan B.

Utah enacted a measure requiring emergency rooms to provide, at the request of a sexual assault victim, information about “emergency contraception.”

Virginia enacted a measure permitting a sexual assault nurse (in the absence of a physician) to provide “emergency contraception” to a victim.

State “Prevention First” Legislation

Taking a cue from Congress, which has introduced the “Prevention First Act,” an act that uses federal funds to expand access to contraceptives including “emergency contraception” and to promote its use, at least two states – Florida and Washington – considered similar measures at the state level, while Georgia considered a resolution urging the enactment of the federal measure.

Collaborative Practice Agreements

A small number of states including New York considered measures permitting nurses, pharmacists, and other health care providers to dispense “emergency contraception” under a collaborative practice agreement with a physician.

Access at State Universities

New York again considered “The Public University Emergency Contraception Act,” requiring every college and university of the State University of New York (SUNY) and the City University of New York to provide “emergency contraception” to any student requesting it and requiring the widespread provision of information at such colleges and universities on the safety and availability of “emergency contraception” on campus.

“Emergency Contraception” Education Programs

At least two states – Michigan and West Virginia – considered legislation creating state-funded educational programs for “emergency contraception.”

LEGAL PROTECTION AND RECOGNITION OF THE UNBORN AND NEWLY-BORN

In 2009, 28 states considered more than 80 measures providing legal protection and recognition to the unborn and newly-born, roughly comparable to activity levels from 2008.

Protection of Unborn Victims of Violence

At least 15 states including Hawaii, Illinois, Indiana, Montana, Nebraska, New York, Oregon, Rhode Island, Tennessee, West Virginia, and Wyoming introduced measures to protect unborn victims of violence.

Indiana enacted a measure criminalizing the killing of an unborn child at any stage of gestation and increasing the penalties for performing an illegal abortion. It also enacted a measure providing an option for enhanced sentencing for any person who kills an unborn child while committing another murder or felony-murder.

One-Victim/Enhanced Penalty Laws

At least six states including Hawaii, North Carolina, Oklahoma, Rhode Island, West Virginia, and Wyoming considered measures criminalizing assaults on pregnant women and providing for enhanced penalties for such actions. However, these measures do not recognize the unborn child as a second victim.

Protection for Pregnant Women

Oklahoma enacted AUL's "Pregnant Woman's Protection Act" which provides an affirmative defense to women who use force to protect their unborn children from criminal assaults.

Substance Abuse by Pregnant Women

Continuing a significant legislative trend over the past few years, at least 19 states including Alabama, Arkansas, California, Hawaii, Illinois, Kentucky, Maine, Minnesota, Missouri, New Mexico, Rhode Island, Tennessee, and Texas introduced measures designed to curb substance abuse by pregnant women and/or provide for needed treatment.

Arkansas enacted a measure defining "neglect" to include the presence of an illegal substance in a newborn's blood and permitting the use of such test result as evidence of neglect in subsequent legal or administrative proceedings.

Texas enacted a measure creating a task force charged, in part, with advising on potential criminal liability for women who expose their unborn children to controlled substances.

Born-Alive Infant Protection

A small number of states including South Carolina considered measures to protect infants born-alive following a botched abortion and to ensure that they receive appropriate medical care and treatment.

Stillborn/Fetal Death Certificates

At least nine states including Alaska, Illinois, Maine, New Mexico, New York, Pennsylvania, Tennessee, and West Virginia introduced measures to provide for a death certificate when an infant is stillborn.

Alaska enacted a measure that permits, upon a parent's request, the issuance of a death certificate and requires medical providers to inform parents of this option.

Indiana enacted a measure requiring the state Department of Health to develop an electronic death registration system that will include information on stillbirths.

Maine enacted a measure permitting the issuance of a death certificate upon a parent's request, while Pennsylvania enacted a measure providing for "fetal death registrations."

Infant Abandonment

At least 11 states including Alaska, Arizona, California, Illinois, New York, North Dakota, Tennessee, and Washington introduced legislation allowing for the legal abandonment of infants under circumstances that ensure their health and safety.

Tennessee enacted a measure to include police and fire stations and "emergency medical services facilities" as permissible locations to legally relinquish an infant.

Washington enacted a measure to include medical clinics (during their established hours of operations) as permissible locations to legally relinquish an infant.

Wrongful-Death (Civil) Causes of Action

At least three states – Alabama, Illinois, and New York – considered measures to provide for a wrongful-death (civil) cause of action in the death of an unborn child. The measures were equally divided between providing protection from conception and after viability.

Wrongful-Birth and Wrongful-Life Causes of Action

New Jersey considered a measure to prohibit both wrongful-birth and wrongful-life causes of action.

BIOETHICS AND BIOTECHNOLOGIES

In 2009, legislators in 31 states considered more than 95 measures related to biotechnologies. This level of activity represents an almost 20 percent increase from 2008. Over the last several years, however, we have noted a significant downward trend in legislation concerning these critical and emerging areas. Thus, even with the increase in bioethics-related legislation in 2009, this level of activity does not compare favorably to the 500 bills introduced in 2005.

Human Cloning

At least 11 states – including Alabama, Georgia, Michigan, Minnesota, Montana, New Mexico, New York, Oklahoma, Oregon, Texas, and West Virginia – considered measures related to human cloning.

Montana enacted a measure that bans cloning for reproductive purposes (that is, cloning to produce children), but it does not ban cloning for all purposes.

Oklahoma enacted a measure that prohibits human cloning for all purposes (including both reproductive cloning and cloning for biomedical research).

Destructive Embryo Research

At least 11 states – including Alabama, California, Illinois, Maryland, Michigan, Minnesota, Mississippi, New Mexico, New York, Oklahoma, and Oregon – considered measures banning or promoting destructive embryo research. In addition, West Virginia considered a measure prohibiting the use of “unborn children” in research experiments.

Oklahoma enacted a measure which prohibits nontherapeutic research that destroys human embryos or subjects embryos to risk of injury or death.

Ethical Forms of Research

At least seven states – Illinois, Maine, Michigan, Minnesota, North Carolina, Ohio, and Texas – considered measures promoting ethical forms of stem cell research, including the use of adult stem cells and umbilical cord blood.

North Carolina enacted legislation requiring the Department of Health and Human Services to make publications available to the public regarding umbilical cord stem cells and umbilical cord blood banking. The new law also required that

the Department encourage health care professionals to provide the publications to their pregnant patients.

State Funding of Biotechnology

Funding measures ran the gamut in 2009, from prohibiting taxpayer funding of destructive embryo research and/or human cloning, to funding ethical forms of research, to funding destructive embryo research. In all, eight states considered funding measures related to biotechnologies.

Four states – Minnesota, Missouri, New York, and Texas – considered measures prohibiting or limiting the use of public funding for human cloning or destructive embryo research. Minnesota enacted a measure prohibiting the funding of human cloning.

Three states – Maine, Nebraska, and Oklahoma – considered measures funding ethical forms of research. Nebraska and Oklahoma enacted measures funding ethical forms of research.

Conversely, only one state – Oregon – considered legislation funding destructive embryo research.

Chimeras

Only two states – Louisiana and Michigan – considered measures prohibiting the creation of human-animal hybrids, with Louisiana enacting its bill.

Assisted Reproductive Technology

At least 19 states considered measures related to assisted reproductive technologies (ART), including *in vitro* fertilization (IVF). As usual, most of these bills involved access to—not regulation of—the ART industry.

HEALTH CARE FREEDOM OF CONSCIENCE

Approximately 35 measures related to health care freedom of conscience were considered in 20 states in 2009 – a decrease of more than 50 percent from 2008 activity levels. However, for the first time in several years, protective measures outpaced measures seeking to violate or compel conscience by more than a 2 to 1 margin.

Comprehensive Protection for Freedom of Conscience

At least ten states – Alabama, Hawaii, Louisiana, Montana, New York, Rhode Island, Tennessee, Texas, Washington, and West Virginia – considered measures providing comprehensive legal protection to health care providers.

Louisiana enacted a measure protecting both individual providers and health care institutions and permitting them to decline to participate in any health care service that violates their conscience.

The Michigan Senate passed a resolution condemning the professed intention of the Obama Administration, specifically the U.S. Department of Health and Human Services (HHS), to rescind the conscience rules approved in December 2008 by the Bush Administration. These rules seek to provide effective enforcement mechanisms for existing federal laws protecting conscience.

Notably, Texas introduced a constitutional amendment providing broad protection for conscience, while New York addressed the need for conscience protection in end-of-life care.

Abortion-Specific Protections

At least ten states introduced measures protecting the right of individual health care providers and/or health care facilities to refuse to provide or participate in abortions.

Arizona enacted a measure expanding its existing protection for conscience. The measure permits individual providers, hospitals, and hospital employees to decline to facilitate an abortion.

The new Louisiana conscience law specifically permits anyone to decline to provide abortions or abortifacients.

Pharmacist-Specific Protection

At least 12 states, including Idaho, Missouri, Montana, North Carolina, and West Virginia, considered measures to specifically protect pharmacists and pharmacies from being compelled to dispense or otherwise provide drugs and devices,

specifically abortifacient drugs and contraceptives, which violate their consciences.

Protection for Health Insurers and Payers

At least five states introduced legislation intended to specifically protect insurance companies and other health care payers from being forced to violate their conscience by offering objectionable coverage.

Compulsion Measures

At least 12 states including California, Florida, Indiana, New York, Missouri, Oklahoma, Rhode Island, Virginia, and Wisconsin considered measures seeking to compel individual pharmacists and pharmacies to violate their consciences by dispensing contraceptives and abortifacients.

As part of the state budget, Wisconsin enacted a requirement that a pharmacy, when presented with a valid prescription, must dispense contraceptives including so-called “emergency contraception” (or Plan B) within “the same timeframe” as they would dispense other drugs.

In Illinois, where litigation continues over a 2005 rule requiring pharmacists and pharmacies to fill prescriptions for “emergency contraception” “without delay,” the legislature considered an amendment to the “Pharmacy Practice Act” prohibiting the State from expending any funds to enforce any rule that requires a person or pharmacy to dispense “emergency contraception.”

END-OF-LIFE ISSUES

In 2009, 44 states considered nearly 150 measures related to end-of-life issues, more than twice 2008 activity levels.

Assisted Suicide and Euthanasia

In 2009, making use of titles such as “Death with Dignity,” “Compassionate Choices,” “Right to Die,” and “Patient Control,” or “Choice,” at least eight states including Connecticut, Hawaii, Massachusetts, Montana, New Hampshire, New Mexico, and Vermont considered measures to legalize (or, in the case of Montana, regulate) physician-assisted suicide (PAS).

Conversely, Wyoming considered a measure criminalizing assisted suicide.

Importantly, euthanasia and PAS advocates have an aggressive agenda to see PAS legalized in all 50 states. Defeat does not deter them, but rather it causes them to re-strategize on how to “soften the ground” or gain acceptance for PAS and then re-attack. During the 2009 state legislative sessions, they did so by pursuing measures that advanced their ideology including lobbying state medical boards to pass resolutions or provide position statements of neutrality or affirmation for PAS, as well as promoting advance directives for individuals to explicitly refuse life-saving medical treatments and artificial sustenance if they become incapacitated. In this vein, Maryland enacted a measure adding a nursing home industry representative to its State Advisory Council on Quality Care at End-of-Life.

Advance Directives, Living Wills, Health Care Powers of Attorney, and Related Documents

The vast majority of end-of-life measures considered in 2009 dealt, in varying ways, with advance directives, “do not resuscitate” (DNR) orders, life-sustaining treatments, and the proper appointment of guardians and health care agents. In 2009, 12 states enacted new or revised current laws dealing with advance directives.

Arizona enacted two measures to amend existing statutes: First, to prohibit a fiduciary or trustee whose license has been revoked from serving as an agent under a health care power of attorney unless the person is related to the principal; and, second, to require the court to give appointed guardians authority to withhold or withdraw life-sustaining treatment, including artificial food and fluids. The second measure further creates a rebuttable presumption in favor of artificial food and fluids if no advance directive exists, and provides clarification for the process and standard of review to be used to rebut the presumption.

Arkansas enacted two measures revising statutes to limit the power of the Department of Human Services (as custodian) from withholding life-sustaining treatment without express court approval and to clarify DNR procedures for nursing facility employees.

Louisiana passed resolutions for two studies. The first study requests the Department of Health and Hospitals to study the use of living wills among

Medicaid recipients, while the second creates a study committee to look at physician orders for life-sustaining care.

Maine enacted two measures: the first developing two education programs about end-of-life directives for the public and the legal community, and the second creating the “Uniform Power of Attorney Act” relating to durable health care powers of attorney.

Minnesota amended applicable statutes to permit the release of medical records to health care agents.

Montana revised its guardianship law to prohibit a guardian from giving a DNR order if it conflicts with an incapacitated person’s wishes.

Both North Dakota and Oklahoma enacted measures creating registries for advance directives for health care.

Oregon amended its laws for advance directives, giving the health care representative the authority to approve short-term hospitalization for dementia patients.

Pennsylvania and Rhode Island passed resolutions to increase awareness and encourage the use of advance directives.

Texas amended its Health and Safety Code to allow for electronic signatures on advance directives and to permit notarization of DNR orders (as an alternative to two witnesses).

Utah amended the “Advance Health Care Directive Act” to expand the list of health care professionals authorized to determine a patient’s decision-making capacity and effectuate a patient’s health care directive.

Finally, Virginia enacted measures creating the “Uniform Power of Attorney Act,” clarifying the process for determining whether a patient lacks decision-making capacity, and specifying how a patient’s DNR orders may be effectively revoked.

Preventing Starvation and Dehydration

At least eight states including Arizona, Arkansas, Mississippi, Montana, New York, Ohio, Oregon, and Texas, considered measures related to life-sustaining treatments including artificial food and hydration.

Arizona created a rebuttable presumption in favor of the continued provision of artificial food and fluids in the absence of an advance directive.

Arkansas amended the “Adult Maltreatment Custody Act” to limit the Department of Human Services when functioning as a patient’s legal custodian from making any decision to withhold life-sustaining treatment without express court approval.

Montana revised its guardianship law to prohibit a guardian from withholding or withdrawing life-sustaining treatment if it conflicts with the incapacitated person’s wishes.

Pain Management

At least 11 states including California, Connecticut, Florida, Hawaii, Kansas, Maine, Massachusetts, Mississippi, Texas, Vermont, and West Virginia considered measures related to proper pain management. Some measures encouraged training in and awareness of pain management; provided protection for physicians employing accepted pain management techniques; enacted a patients’ bill of rights; or sought to regulate pain management clinics and the controlled substances used to treat pain.

California established September 2009 as “Pain Awareness Month” to inform health care providers of the need for effective pain management.

Connecticut enacted a measure requiring direct-care nursing home staff to complete annual training in pain recognition and the administration of pain management techniques.

Florida enacted the “Prescription Drug Monitoring Program” to monitor use of controlled substances in an electronic database system. Meanwhile, Maine directed its Board of Licensure in Medicine to establish common protocols for the use of controlled substances.

Texas enacted a measure to create licensing and regulation for pain management clinics.

West Virginia made minor changes to its “Management of Pain Act,” specifically in its definitions of “pain” and “pain-relieving controlled substances.”

Palliative Care

At least four states, including Colorado, Illinois, New York, and Vermont, considered legislation to encourage training in and funding of palliative care. Illinois specifically considered pediatric palliative care. New York sought to require health care practitioners to provide palliative care information and to counsel patients diagnosed with a terminal illness or condition on their options.

Colorado passed a resolution for a Hospice Palliative Care Interim study.

Vermont enacted a “Patient’s Bill of Rights for Palliative Care and Pain Management” to ensure health care providers inform patients of all their treatment options.