



**NEW LAW EXPANDING REQUIREMENTS FOR
INFORMED CONSENT FOR ABORTION
(1995 WISCONSIN ACT 309)**

Information Memorandum 96-8

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INTRODUCTION

This Information Memorandum describes Wisconsin’s new law expanding requirements for informed consent for abortion. As of the date of publication of this revised Information Memorandum, a temporary restraining order entered by Judge Barbara Crabb of the U.S. District Court for the Western District of Wisconsin in the case of *Karlin v. Foust* (Case No. 96-C-0374-C) is in effect. This order enjoins enforcement of the penalty provisions of 1995 Wisconsin Act 309. These provisions are described in Sections III. G. and H. of this Information Memorandum.

Copies of Act 309 referred to in this Information Memorandum may be obtained from the Documents Room, Lower Level, One East Main Street, Madison, Wisconsin 53702; telephone: (608) 266-2400.

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I. KEY PROVISIONS OF 1995 WISCONSIN ACT 309

A. PROVISION OF INFORMATION

1. For a woman seeking an abortion, information regarding the pregnancy and the abortion procedure must be provided to the woman *in person and orally*, by the *physician who is to perform or induce the abortion or any other qualified physician*.

2. Information regarding services and programs to assist the woman with her pregnancy and subsequent parenthood, if she decides to carry the pregnancy to term, must be provided, *in person and orally*, by the *physician* or a *qualified person assisting the physician*.

3. Additional printed information, including pictures of the fetus at specified gestational intervals, must be *physically given* to the woman seeking the abortion.

B. 24-HOUR WAITING PERIOD

Act 309 requires that the information specified in Part I, A, be provided at least **24 hours** before the abortion is to be performed or induced.

C. PENALTIES

1. Act 309 creates a *forfeiture* of not less than \$1,000 nor more than \$10,000 for persons who violate the informed consent provision of the Act.

2. Act 309 specifies *civil remedies* for a woman who is damaged due to violations of the informed consent provisions of the Act. The Act also authorizes *punitive damages*.

D. UNPROFESSIONAL CONDUCT

Under Act 309, a violation of the informed consent provisions by any of the professionals subject to the Act would be considered *unprofessional conduct*.

II. BACKGROUND DATA RELATING TO ABORTIONS IN WISCONSIN

This Part provides selected data on abortions performed in Wisconsin in 1994, the most recent year for which data are available (data are published each year for the preceding calendar year). These data are taken from the report, "Reported Induced Abortions in Wisconsin, 1994," published by the Center for Health Statistics, Department of Health and Social Services (DHSS). These data are collected pursuant to the requirement in s. 69.186, Stats. This statute requires information on each abortion performed in Wisconsin each year to be reported to the state. The following information must be included with respect to each patient:

1. The state, and if this state, the county, of residence.
2. Patient number.
3. Race.
4. Age.
5. Marital status.
6. Month and year in which the abortion was performed.
7. Education.
8. The number of weeks since the patient's last menstrual period.
9. Complications, if any, resulting from performance of the induced abortion.

In addition to general abortion data, specific data are presented on items for which the informed consent law requires information be provided and for which data is collected: weeks of gestation at the time of the abortion and complications of abortion.

For 1994, abortions in the 20-29 age group accounted for 55% of all abortions performed in Wisconsin. Nineteen percent of abortions were performed on females age 15-19; with 1% performed on females under 15. Twenty-two percent of abortions were performed on females age 30-39; and 2% were performed on females age 40 and older.

The large majority of abortions were performed on unmarried women in 1994. Eighty-four percent of women obtaining abortions in Wisconsin in 1994 were unmarried.

White women represented the largest group (75%) of women receiving abortions in Wisconsin in 1994. Black women obtained 20% of abortions and other non-White ethnic groups received 4% of abortions in Wisconsin in 1994.

Table 1 shows the total number, ratio to live births and rate of reported induced abortions in Wisconsin for the years 1987-1994.

TABLE 1

REPORTED INDUCED ABORTIONS, 1987-1994			
<i>Year</i>	<i>Number</i>	<i>Ratio¹</i>	<i>Rate²</i>
1987	17,318	24	16
1988	17,986	25	16
1989	17,575	25	16
1990	16,848	23	15
1991	16,237	23	14
1992	15,549	22	14
1993	14,671	21	13
1994	13,396	20	12

¹“Ratio” is the number of reported induced abortions in Wisconsin per 100 Wisconsin live births.

²“Rate” is the number of reported induced abortions in Wisconsin per 1,000 Wisconsin women ages 15-44.

SOURCE: Center for Health Statistics, “Reported Induced Abortions in Wisconsin, 1994,” page 9.

Table 1 shows a decline in the number, rate and ratio of abortions in Wisconsin since 1990. Between the years 1990 and 1994, the number of abortions dropped from 16,848 to 13,396. The abortion rate declined from 15 per 1,000 to 12 per 1,000; the abortion ratio declined from 23 per 100 live births to 20 per 100 live births.

The next two tables provide information on abortion by estimated gestation and complications of abortions.

TABLE 2

REPORTED INDUCED ABORTIONS BY ESTIMATED GESTATION		
<i>Weeks of Gestation</i>	<i>Total Abortions Reported</i>	
	<i>Number</i>	<i>Percent</i>
8 or less	6,569	49%
9-10	3,515	26%
11-12	1,712	13%
13-15	901	7%
16-20	579	4%
Over 20	120	1%
Total	13,396	100%

SOURCE: Center for Health Statistics, “Reported Induced Abortions in Wisconsin, 1994,” page 12.

As can be seen in Table 2, approximately half of the abortions in 1994 were performed at eight or less weeks gestation. Eighty-eight percent of all abortions in Wisconsin in 1994 were performed in the first trimester (the first 12 weeks of gestation).

TABLE 3

REPORTED INDUCED ABORTIONS BY COMPLICATIONS DURING THE VISIT, WISCONSIN, 1994	
<i>Complications</i>	<i>Total Abortions Reported</i>
None	13,352
Some complication (during the visit):	
Hemorrhage	8
Infection	3
Uterine Perforation	3
Cervical Laceration	7
Retained Products	11
Other	12
Total	13,396

SOURCE: Center for Health Statistics, “Reported Induced Abortions in Wisconsin, 1994,” page 13.

As indicated in Table 3, most abortions are performed without reported complications occurring *during* abortion visits in 1994. Over 99% (13,352 out of 13,396) of abortions were performed without any reported complication occurring *during* the visit.

III. DESCRIPTION OF 1995 WISCONSIN ACT 309

A. DEFINITION OF ABORTION

Act 309 defines “abortion” as follows:

“Abortion” means the use of an instrument, medicine, drug or other substance or device with intent to terminate the pregnancy of a woman known to be pregnant or for whom there is reason to believe that she may be pregnant and with the intent other than to increase the probability of a live birth, to preserve the life or health of the infant after live birth or to remove a dead fetus [s. 253.10 (2) (a), Stats., as affected by 1995 Wisconsin Act 309].

B. INFORMED CONSENT PROVISIONS

Act 309 requires that the following information be provided *in person and orally by the physician* who is to perform or induce the abortion, or by *any other qualified physician* (defined as “a physician who by training or experience is qualified to provide the information”):

1. Whether or not, according to the reasonable medical judgment of the physician, the woman is pregnant.
2. The probable gestational age of the unborn child at the time the information is provided. This information must also be provided in writing.

3. The particular medical risks, if any, associated with the woman's pregnancy.
4. The probable anatomical and physiological characteristics of the unborn child at the time the information is given.
5. The details of the medical or surgical method that would be used in performing or inducing the abortion.
6. The medical risks associated with the particular abortion procedure that would be used, including the risks of infection, psychological trauma, hemorrhage, endometritis, perforated uterus, incomplete abortion, failed abortion, danger to subsequent pregnancies and infertility.
7. That fetal ultrasound imaging and auscultation of fetal heart tone services are available that enable a pregnant woman to view the image or hear the heartbeat of her unborn child. The physician must also advise the woman as to how she may obtain these services if she so desires.
8. The recommended general medical instructions for the woman to follow after an abortion to enhance her safe recovery and the name and telephone number of a physician to call if complications arise after the abortion.
9. If, in the reasonable medical judgment of the physician, the woman's unborn child has reached viability, that the physician is required under s. 940.15, Stats., to take all steps necessary to preserve and maintain the life and health of the child. [It should be noted that under current law, s. 940.15, Stats., *prohibits* post-viability abortions unless necessary to preserve the life and health of the woman and unless done in the manner most likely to maintain the life and health of the child.]
10. Any other information that a reasonable patient would consider material and relevant to a decision of whether or not to carry a child to birth or to undergo an abortion.
11. That the woman may withdraw her consent to have an abortion at any time before the abortion is performed or induced.
12. That the woman is not required to pay any amount for performance or inducement of the abortion until at least 24 hours have elapsed after the information has been provided to the woman.

The Act also requires the *physician* who is to perform the abortion, *a qualified person assisting the physician* (who may be a social worker, registered nurse or physician assistant) *or another qualified physician* to *in person and orally* inform the woman of all of the following:

1. That benefits under the Medical Assistance (MA) Program may be available for prenatal care, childbirth and neonatal care.

2. That the father of the unborn child is liable for assistance in the support of the woman's child, if born, even if the father has offered to pay for the abortion.

3. That the woman has the legal right to continue her pregnancy and keep the child, place the child in foster care, place the child with a relative for adoption or petition the court for placement of the child for adoption in the home of a person who is not a relative.

4. That the woman has the right to receive and review the printed materials prepared and provided by the state [described in Part III, E, of this Information Memorandum]. The physician or qualified person must physically give the materials to the woman and must, in person, orally inform her that the materials are free of charge, have been provided by the state and describe the unborn child and list agencies that offer alternatives to abortions. Current, updated copies of the printed materials must be provided to the woman free of charge.

5. If a woman who has received a diagnosis of disability of her unborn child, that the printed materials the woman is required to receive contain information on community-based services and financial assistance programs for children with disabilities and their families, information on support groups for people with disabilities and parents of children with disabilities and information on adoption of children with special needs.

6. If a woman asserts that her pregnancy is a result of sexual assault or incest, that the printed materials the woman is required to receive contain information on counseling services and support groups for victims of sexual assault and incest and legal protections available to the woman and her child if she wishes to oppose establishment of paternity or to terminate the father's parental rights.

7. The availability of public and private agencies and services to provide the woman with birth control information, including natural family planning information.

All of the required information must be provided in a setting that protects the woman's privacy, maintains the confidentiality of her decision and ensures that the information she receives focuses on her individual circumstances. The woman may have a family member or any other person of her choice present during this private counseling.

Further, the Act requires the person who is providing the information to give an adequate opportunity for the woman to ask questions regarding the pregnancy, the unborn child, abortion, foster care and adoption, and provide the information that is requested or indicate to the woman where she can obtain the information.

The woman must certify in writing that she has received the required information and that all of her questions have been answered in a satisfactory manner. The woman must also indicate on the certification who provided the information to her and when it was provided. In addition, the name of the physician who will perform the abortion must be written on the certification. The physician must receive the written certification prior to the abortion and it must be placed in the woman's medical record either by the physician or the qualified person assisting the physician. The woman must also be given a copy of the certification.

Act 309 provides that there is a presumption that the woman's consent to the abortion is informed if the Act's provisions regarding written and oral information are complied with. However, Act 309 states that there is no presumption that a woman's consent to an abortion is voluntary, even if all of the requirements are complied with.

The Act also provides that if the woman providing informed consent is a minor, the required information must also be given to the person who gives consent under s. 48.375 (4) (a) 1., Stats. (the parental consent law). If the woman considering an abortion has been adjudicated incompetent under ch. 880, Stats., the required information must also be given to her guardian.

C. 24-HOUR WAITING PERIOD

Act 309 requires that the information provided by the physician and by the qualified person assisting the physician be provided at least **24 hours** before the abortion is to be performed or induced. In addition, the information must be provided to the woman ***in person*** and ***orally***. If a medical emergency exists, the physician may perform an immediate abortion, but must still attempt to obtain the woman's written consent before the abortion. Act 309 defines "medical emergency" as "a condition, in a physician's reasonable medical judgment, that so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a 24-hour delay in performance or inducement of an abortion will create serious risk of substantial and irreversible impairment of one or more of the woman's major bodily functions" [s. 253.10 (2) (d), Stats., as created by 1995 Wisconsin Act 309].

D. EXCEPTION FOR CERTAIN VICTIMS OF SEXUAL ASSAULT OR INCEST

Act 309 permits a woman seeking an abortion to waive the 24-hour waiting period if she alleges that the pregnancy is the result of a sexual assault under s. 940.225 (1), (2) or (3), Stats. (first-, second- or third-degree sexual assault). However, the woman must state that the sexual assault has been reported to law enforcement authorities, and the physician or person assisting the physician must confirm with law enforcement authorities that the report was made and make a notation in the woman's medical record. In addition, the woman must still receive all of the oral and written information.

This exception does not apply if the pregnancy results from the sexual assault of a child under s. 948.02, Stats. (having sexual contact or intercourse either with a child under age 13, which is first-degree sexual assault, or having sexual contact or intercourse with a person under age 16, which is second-degree sexual assault).

The Act reduces the 24-hour waiting period to two hours if the woman alleges the pregnancy is the result of incest under s. 948.06 (1), Stats. (incest with a child). However, the woman must state that a report alleging the incest has been made to the law enforcement authorities. In addition, the physician or person assisting the physician must confirm that the report was made and make a notation in the woman's medical record. In addition, the woman must still receive all of the oral and written information.

No record of a request made for information regarding these reports of sexual assault or incest may be disclosed by the law enforcement authorities.

E. PRINTED INFORMATION TO BE PROVIDED

Act 309 requires the DHSS to publish materials in English, Spanish and other languages for distribution to county departments who must, in turn, provide them to physicians who perform or induce abortions upon the physician's request. The DHSS and the county departments may charge a fee for these materials not to exceed the actual costs of preparation and distribution. [Under the Act, physicians are required to request the materials from the DHSS or the county department.] The materials prepared by the DHSS must be the following:

1. Geographically indexed materials about agencies, including adoption agencies, and services that are available to assist the woman through pregnancy, upon childbirth and while the child is dependent. The materials must also describe how these agencies may be contacted and include telephone numbers and addresses. Information on available ultrasonic imaging and auscultation of fetal heart tone services must also be provided. Further, the printed materials must include geographically indexed materials that are designed to assist a woman if she has received a diagnosis that her unborn child has a disability or if her pregnancy is a result of sexual assault or incest. Also, the materials must include information, for a woman whose pregnancy is the result of sexual assault or incest, on legal protections available to the woman and her child if she wishes to oppose establishment of paternity or to terminate the father's parental rights. The materials must also provide information on the availability of government-funded programs serving pregnant women and children, including Aid to Families with Dependent Children (AFDC), MA, the Job Opportunities and Basic Skills (JOBS) Program, the Family and Medical Leave Law, child care, child support laws and various tax credits. The materials must state that it is unlawful for anyone to coerce a woman to have an abortion, that a physician who performs an abortion without the woman's voluntary and informed consent is liable for civil damages and subject to a civil penalty, that the father of the child is liable for child support, and that if the child is placed for adoption, the adoptive parents may pay the cost of prenatal care, childbirth and neonatal care.

2. Materials, including photographs, pictures or drawings, designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments for the first 16 weeks of pregnancy and at four-week gestational increments from the 17th week of pregnancy to full term. The information must also include relevant information regarding the time at which the unborn child could possibly be viable. The pictures or drawings must contain the dimensions of the unborn child and must be realistic and appropriate for the stage of pregnancy depicted. The materials must be objective, nonjudgmental and designed to convey only accurate scientific information about the unborn child at various gestational ages. The materials must also contain objective, accurate information about abortion procedures commonly employed, including medical and psychological risks commonly associated with each procedure. They must also include information on medical risks commonly associated with carrying a child to birth.

3. The materials must include a certification form that lists, in a check-off format, all the information required to be provided.

F. HOTLINE

Act 309 provides that the DHSS may maintain a toll-free telephone number, available 24 hours per day, to provide the geographically indexed materials referred to in Part III, E, of this Information Memorandum, regarding agencies and services for pregnant women.

G. PENALTIES FOR VIOLATION OF THE INFORMED CONSENT LAW

Act 309 creates a penalty for persons who violate the informed consent requirement in the Act. This penalty applies to physicians who are required to personally inform the patient of the requirements in the Act, as well as qualified persons assisting the physician (nurses, physician assistants or social workers) who may provide information on any financial assistance available in the event that she gives birth to the child. This penalty is a forfeiture of not less than \$1,000 nor more than \$10,000.

The Act specifies civil remedies in addition to this forfeiture. First, the Act provides that a person who violates the informed consent provisions is liable to the woman upon whom the abortion is performed for damages arising out of the performance or inducement of the abortion, including damages for personal injury and emotional and psychological distress.

The Act also authorizes punitive damages. If a person who has been awarded damages in a civil action proves that the defendant acted maliciously toward the plaintiff or with an intentional disregard of the plaintiff's rights, the person shall, in addition to any damages for personal injury or emotional and psychological distress, be entitled to not less than \$1,000 nor more than \$10,000 in punitive damages.

H. DISCIPLINE OF HEALTH PROFESSIONALS FOR VIOLATIONS OF INFORMED CONSENT LAW

Under Act 309, a violation of the informed consent provisions, as created by the Act, by a physician, physician assistant, nurse or social worker would be considered unprofessional conduct. Allegations of unprofessional conduct by these health care professionals would subject them to investigation and possible disciplinary action by their respective examining boards.

IV. INFORMED CONSENT AND WAITING PERIOD LAWS OF OTHER STATES

This Part of the Information Memorandum summarizes laws of other states which require the provision of oral or written information to a woman prior to an abortion, prescribe a waiting period before a woman may obtain an abortion, or both.

Table 4 shows states which currently have either or both of these requirements. Table 4 also specifies who must provide the required information to the woman seeking the abortion. It also indicates which waiting period laws are currently being enforced, since some have been temporarily or permanently enjoined by court order. All informed consent laws are currently being enforced.

It should be noted that the informed consent laws represented in the Table vary greatly in the type and amount of information required to be provided to the woman prior to her giving her informed consent.

TABLE 4

STATES WITH ABORTION INFORMATION/WAITING PERIOD REQUIREMENTS					
<i>State</i>	<i>Oral Information</i>	<i>Written Information</i>	<i>Who Must Provide</i>	<i>Waiting Period</i>	<i>Waiting Period Enforced</i>
Alabama		✓	Physician	None	
Delaware	✓		Does not specify	24 hours	No
Florida	✓		Abortion referral/counseling agency	None	
Idaho	✓		Physician	24 hours	Yes
Indiana	✓		Physician, referring physician or other health care provider as specified	18 hours	No
Kansas		✓	Attending physician or other health care provider	8 hours	Yes
Kentucky		✓	Attending physician or agent	2 hours	No
Louisiana	✓	✓	Attending or referring physician	24 hours	Yes
Maine	✓		Attending physician	None	
Massachusetts		✓	Physician	24 hours	No
Michigan	✓	✓	Physician or other qualified person	24 hours	No
Minnesota	✓		Does not specify	None	
Mississippi	✓		Physician, referring physician or agent	24 hours	Yes
Missouri	✓		Physician	None	
Montana	✓	✓	Physician and agent	24 hours	No
Nebraska	✓		Physician or agent	24 hours	Yes
Nevada	✓		Physician or other qualified person	None	
North Dakota	✓	✓	Physician, referring physician or agent	24 hours	Yes
Ohio	✓	✓	Physician and agent	24 hours	Yes

<i>State</i>	<i>Oral Information</i>	<i>Written Information</i>	<i>Who Must Provide</i>	<i>Waiting Period</i>	<i>Waiting Period Enforced</i>
Oklahoma		✓	Attending physician	None	
Pennsylvania	✓	✓	Physician and other qualified person	24 hours	Yes
Rhode Island	✓		Physician or agent	None	
South Carolina	✓	✓	Physician or allied health professional	1 hour	Yes
South Dakota	✓		Physician or referring physician	24 hours	Yes
Tennessee	✓		Physician	48-72 hours	No
Utah	✓		Physician or specified health care provider	24 hours	Yes
Wisconsin	✓	✓	Physician and other qualified person	24 hours	No

As Table 4 shows, 19 states currently have passed informed consent laws coupled with a waiting period. Eight of the 19 waiting period laws are not being enforced. Eight additional states have some type of informed consent law without a waiting period.

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