ATTORNEY GENERAL OPINION NO. 98-1

The Honorable John H. Tippets
Idaho House of Representatives
Idaho State Legislature
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. What are the standards expressed by the United States Supreme Court regarding a state's ability to regulate abortion?

2. Do Idaho's statutes regulating abortion conform with the United States Supreme Court's standards?

3. Do any of the draft bills that the Idaho Legislature may consider during the 1998 session pertaining to abortion resolve potential constitutional problems with the current Idaho statutes or create additional constitutional problems?

4. Does the Idaho Constitution create any rights or limits that pertain to the state's ability to regulate abortion?

CONCLUSION

1. The United States Supreme Court has held that a woman has a constitutional right to obtain a pre-viability abortion and a state may not place an undue burden on this right. After fetal viability, a state may proscribe abortion except where it is necessary in appropriate medical judgment for the preservation of the life or health of the mother. The Supreme Court has upheld a 24-hour waiting period and an informed consent provision requiring the giving of truthful, nonmisleading information about the nature of the abortion procedure, about attendant health risks of abortion and childbirth, and about probable gestational age of the fetus. The provisions upheld contained medical emergency exceptions. The Court has also upheld a one-parent consent requirement for a minor seeking an abortion that included an adequate judicial bypass procedure. Further, the Court has upheld reasonable recordkeeping and reporting provisions as long as the confidentiality of the woman is protected and the increased reporting costs do not become a substantial obstacle to a woman's right to obtain a pre-viability abortion. Finally, the Court has invalidated any spousal notification or consent requirement.

2. There are some constitutional problems with Idaho's current abortion statutes. To begin, the requirement contained in Idaho Code § 18-608 that second-trimester

abortions be performed in a hospital is unconstitutional. In addition, Idaho statutes do not contain a health exception for the ban on third-trimester abortions. Further, the definition of viability in Idaho Code § 18-604(7) is broader than the definition provided by the United States Supreme Court and thus correspondingly narrows the woman's ability to obtain an abortion prior to viability. Also, the parental notification provision contained in Idaho Code § 18-609(6) does not contain a bypass procedure, judicial or otherwise. Finally, it is not entirely clear whether the legislature intended the informed consent requirements of Idaho Code § 18-609 to carry criminal penalties.

3. a. Idaho Abortion Statute Amendments Draft Bill: This draft bill deletes the second-trimester hospitalization requirement contained in the current statute but does not add a health exception to the post-viability abortion ban. Likewise, it retains the problematic definition of "viability." The bill contains a two-parent consent requirement; authority is split on whether a state can require a two-parent consent, even with a judicial bypass. In addition, the bill specifies that a violation of the current informed consent provision is a misdemeanor; however, it has not provided a clear enforcement mechanism to the additional duties it imposes upon physicians. Additionally, concerning the proposed misdemeanor language, there could be circumstances in which a physician could be found to be in violation of the informed consent provision without a *scienter* requirement. This could unconstitutionally chill the willingness of physicians in the state to perform abortions. Regarding the reporting requirements, it is imperative that the confidentiality of the woman be protected, and precedent indicates that the physician's identity should be protected from public disclosure as well. This bill protects the identity of the woman but, because it is not clear whether the reports are available to the public, it is not clear whether the physician's identity is protected from public disclosure.

b. Partial Birth Abortion Draft Bill: Partial birth abortion prohibitions have been challenged in several states. Thus far, reviewing courts have invalidated them primarily on the ground that a woman cannot be required to use a different and potentially riskier procedure. Women's Medical Professional Corporation v. Voinovich, 130 F.3d 187 (6th Cir. 1997); Planned Parenthood of Southern Arizona, Inc. v. Woods, No. 97-385-TUC-RMB, 1997 WL 679921 (D. Ariz. Oct. 27, 1997); Carhart v. Stenberg, 972 F. Supp. 507 (D. Neb. 1997); Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997). Ohio has filed a petition for a writ of *certiorari* on this issue with the United States Supreme Court, which has not yet been denied or granted.[1]

c. Parental Consent to Abortion Draft Bill: In addition to requiring that a minor obtain the consent of one parent, this draft bill would require that a pregnant woman who has had a guardian or conservator appointed after a finding of disability, incapacity or mental illness obtain the consent of her guardian or conservator before having an abortion. While there is an absence of case law on this issue, a reviewing court might not conclude that such a woman is in the same situation as a minor and might find this provision troubling under some circumstances. The judicial bypass provision contained in this bill appears generally sound; however, the drafters may want to consider including a specific timetable for court hearings and decisions. Further, while providing for civil liability, the bill does not specify whether anyone beyond the physician would be liable nor does it limit the amount of recovery or whether guardians and conservators have standing to sue in addition to parents. As with the Idaho Abortion Statute Amendments bill, it is not clear whether the identity of the physician is protected from public disclosure under the reporting requirements.

4. Some state supreme courts have construed their state constitutions as providing broader protection for abortion than does the federal Constitution. The Idaho Supreme Court, while it has held that the Idaho Constitution can be construed more broadly than the federal Constitution, has not yet addressed this issue specifically. One state district court held that the Idaho Constitution provides "broader protection than the federal constitution" when addressing an abortion issue. However, this remains an open question at the state appellate level.

ANALYSIS

Question No. 1:

You have asked what standards the United States Supreme Court has established regarding a state's ability to regulate abortion. The most significant recent statement from the United States Supreme Court concerning abortion is Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). In that opinion the Court reaffirmed earlier decisions, holding that a woman has a constitutional right to obtain a pre-viability abortion, and a state may not place an undue burden on this right. A regulation imposes an undue burden if it places a substantial obstacle in the path of a woman who seeks to abort a nonviable fetus.

The Casey Court went on to hold that state regulations designed to foster the health of a woman who seeks an abortion before fetal viability are valid if they do not constitute an undue burden on that right. *Id.* at 878. In addition, a state has a "profound interest in potential life" and "throughout pregnancy, the state may take measures to

ensure that the woman's choice is informed." *Id.* The measures designed to advance this interest will not be invalidated as long as they are truthful and not misleading and they do not place "an undue burden" on the woman's right to obtain a pre-viability abortion. *Id.* at 878, 882. However, unnecessary regulations that have the purpose or effect of presenting a substantial obstacle to a woman who seeks an abortion before viability impose an undue burden on that right and are invalid. *Id.*

After fetal viability, a state may proscribe abortion except where it is necessary, in appropriate medical judgment, for preservation of the life or health of the mother. *Id.* at 878. Viability is the point in time at which there is a realistic possibility of maintaining and nourishing a life outside the womb. *Id.* at 870. The United States Supreme Court has noted that viability can occur as early as 23 to 24 weeks. *See, e.g.,* Roe v. Wade, 410 U.S. 113, 160, 93 S. Ct. 705, 730, 35 L. Ed. 2d 147 (1973).

In Casey, the Supreme Court upheld several types of abortion regulations. For example, the Supreme Court upheld an informed consent provision that required the giving of truthful, nonmisleading information about the nature of the abortion procedure, about attendant health risks of abortion and of childbirth, and about probable gestational age of the fetus, holding that this requirement did not impose an undue burden on the woman's right to choose to terminate her pregnancy. *Id.* at 881. Likewise, the Court upheld a 24-hour waiting period. *Id.* at 884. Importantly, both of these requirements contained medical emergency exceptions. *Id.* at 879. It is clear from reading the Casey decision that the informed consent provision and 24-hour waiting period would not have been upheld without the medical emergency exception. *Id.* at 885. Further, the Court observed that the Pennsylvania statute at issue also provided that the doctor did not have to comply with the informed consent provision if he or she reasonably believed that furnishing the information would have a severely adverse effect on the physical or mental health of the patient. *Id.* at 883-84.

The Supreme Court also upheld a one-parent consent requirement for a minor seeking an abortion that included an adequate judicial bypass procedure allowing a court to authorize the performance of an abortion if the minor was mature and capable of giving informed consent or if the abortion was in her best interest. *Id.* at 899. The Supreme Court held it unconstitutional to require a woman notify her spouse or obtain his consent prior to an abortion. *Id.* at 895.

In Casey, the Supreme Court went on to uphold reasonable recordkeeping and reporting provisions, as long as the confidentiality of the woman was protected. *Id.* at 900-901. The Court held that recordkeeping and reporting provisions are reasonably directed to the preservation of maternal health, but that they must properly respect a patient's confidentiality and privacy. The Court then noted that the requirements it was reviewing did not impose a substantial obstacle to a woman's choice because the increase in the cost of the abortions would be slight. *Id.* at 901. The Court left open the

possibility that at some point increased reporting costs could become a substantial obstacle, but stated there was no showing of this on the record before it. *Id.* The Court did, however, strike down one particular reporting provision which required that a married woman provide her reason for failing to notify her husband about the abortion. *Id.*

Hopefully these basic principles and black letter law will be useful as abortion issues are considered.

Question No. 2:

Your second question concerns Idaho's current abortion statutes and whether these statutes conform to the constitutional standards set forth by the United States Supreme Court. Idaho's current abortion statutes are found at Idaho Code §§ 18-601, *et seq.* It is worth noting that title 18 deals primarily with criminal matters and is entitled "CRIMES AND PUNISHMENTS." Copies of these statutes are enclosed with this opinion. I have also enclosed the 1993 Attorney General's Opinion reviewing the constitutionality of these statutes. 1993 Idaho Att'y Gen. Ann. Rpt. 5.

As a preliminary matter, this opinion notes that Idaho's abortion statutes have not been judicially challenged. Statutes are entitled to a presumption of constitutionality, unless the constitutional issue raised by the statute has already been judicially resolved. *See, e.g.,* Bon Appetit Gourmet Foods, Inc. v. State, Dept. of Employment, 117 Idaho 1002, 793 P.2d 675 (1989). As discussed below, some issues raised by Idaho statutes have been judicially resolved by the United States Supreme Court and some have not. As to those issues which have not been resolved, the Attorney General has a duty to defend the state statutes pursuant to Idaho Code § 67-1401.

Because Idaho's abortion statutes were enacted prior to the Casey decision, the statutes are drafted under the trimester construct articulated in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). Idaho Code § 18-608 permits first-trimester abortions and, also, second-trimester abortions if the second-trimester abortions are performed in a hospital. Idaho Code § 18-608(3) prohibits third-trimester abortions unless the abortion "is necessary for the preservation of the life of [the] woman or, if not performed, such pregnancy would terminate in birth or delivery of a fetus unable to survive."

There are three constitutional problems with Idaho Code § 18-608. First, the United States Supreme Court has held that a state may not require that second-trimester abortions be performed in a hospital. Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983). Medical science has advanced so that some second-trimester abortions can be safely performed without hospitalization. Consequently, the Supreme Court has concluded that requiring

hospitalization for all second-trimester abortions is unreasonable and unconstitutional. *Id.*

Second, as discussed above, under the Casey decision, while a state may prohibit post-viability abortions, it can only do so if the life or health of the mother is not jeopardized. At least one federal circuit court of appeals has held that "health" encompasses not only a severe non-temporary physical health problem, but also severe non-temporary mental and emotional harm. *See* Women's Medical Professional Corporation v. Voinovich, 130 F.3d 187 (6th Cir. 1997). Idaho's statute contains an exception to the third-trimester prohibition if the life of the mother is endangered. It does not, however, contain an exception if her health is jeopardized. The omission of any health exception in Idaho's ban on third-trimester abortions creates an additional constitutional problem.

A third constitutional problem may be raised when the third-trimester abortion prohibition is read in conjunction with the statute's definitions of the "third trimester of pregnancy" and of viability. Idaho Code § 18-604(6) defines the third trimester of pregnancy as "that portion of a pregnancy from and after the point in time when the fetus becomes viable." Idaho Code § 18-604(7) defines a viable fetus as "a fetus potentially able to live outside the mother's womb, albeit with artificial aid." This definition of viability departs from the definition provided by the United States Supreme Court. The United States Supreme Court has held that viability is the time at which there is a "realistic possibility of maintaining and nourishing a life outside the womb." *See* Casey, 505 U.S. at 870. Should a case arise under this portion of the statute, a court might conclude there is a difference between a "realistic possibility" of maintaining and nourishing a life outside the womb and a "potential" ability to live outside the womb. A broader definition of viability which correspondingly narrows or restricts the woman's ability to obtain an abortion prior to viability conflicts with the Casey decision.

Under Idaho Code § 18-609(2), the Idaho Department of Health and Welfare must publish and make available to abortion providers printed materials containing information about fetal development, abortion procedures and risks, and services available to assist a woman through a pregnancy, at childbirth and while the child is dependent. The department must also annually compile and report to the public the number of abortions performed in which materials containing the information described above were not provided to the pregnant patient. *See* Idaho Code § 18-609(4). Idaho Code § 18-609(3) provides that these materials should be provided to the pregnant patient, if reasonably possible, at least 24 hours before the performance of the abortion. Idaho Code § 18-609(4) further provides that disclosure of the materials is not required if the physician reasonably determines that disclosure of the materials would have a severe and long-lasting detrimental effect on the health of the woman.

In the 1993 Attorney General's Opinion, this office concluded that this informed consent provision and 24-hour waiting period were probably constitutional under the Casey decision. However, this office also observed that it was not entirely clear whether the informed consent provision carried with it any criminal penalties. This office's analysis on this point is fairly lengthy and will not be restated in detail here. As noted, the opinion containing that analysis is enclosed with this opinion. The office ultimately concluded that while reasonable arguments could be raised on both sides of the issue, the more persuasive argument was probably that criminal penalties had not been intended.[2]

This office also reviewed the parental notification provision contained in Idaho Code § 18-609(6). This notification provision does not contain a judicial bypass procedure. The opinion of this office was that while the statute would probably survive a facial challenge, it was potentially vulnerable to a constitutional attack under certain factual circumstances because of the absence of a bypass procedure, judicial or otherwise.

Question No. 3:

Your third question concerns the proposed abortion draft bills presently before the Idaho Legislature. The draft bills are RS07560, RS07503, and a document entitled "Idaho Abortion Statute Amendments." You have asked whether any of these draft bills resolve constitutional problems with the current statutes or raise additional constitutional problems.

We have reviewed three draft abortion bills which we understand will be considered by the Idaho Legislature. This opinion will not discuss policy implications of those draft bills, as that is the prerogative of the legislature. The purpose of this opinion and the proper role of this office is to discuss any possible constitutional problems in these draft bills and refer you to relevant case law. It is the duty of the Office of the Attorney General to give an opinion in writing, when required, to senators and representatives upon questions of law. Idaho Code § 67-1401(7).

A. Idaho Abortion Statute Amendments

The first draft bill this opinion will discuss is entitled "Idaho Abortion Statute Amendments." This proposal provides a list of definitions, deletes the second-trimester hospitalization requirement contained in the current law, provides a section requiring that a minor seeking an abortion obtain the consent of both parents or judicial authorization, amends Idaho Code § 18-609(3) to clarify that a physician who does not comply with the informed consent provisions of the current statute will be subject to misdemeanor criminal penalties, sets forth physician's duties when performing an abortion on a woman who is carrying an unborn child of 20 or more weeks gestational age, and imposes certain recordkeeping and reporting requirements on physicians. The draft bill also contains a severability provision.

Section I of the draft bill sets forth a list of definitions. The definition of viability is the same as that in the current abortion statute. As discussed above, this definition could be construed as broader than the definition set forth by the Supreme Court in Casey.

Under Section II of the draft bill, the hospitalization requirement of Idaho Code § 18-608(2) is deleted, correcting that constitutional defect in Idaho's current statute. The other constitutional defect of Idaho Code § 18-608, discussed above, the absence of a health exception for the prohibition on third-trimester abortions, has not been corrected by this draft bill. Consequently, even if this draft bill is passed, that constitutional defect in the current abortion statute would remain.

Section III of the draft bill contains the parental consent provision for a minor seeking to obtain an abortion. This portion of the draft bill also includes a judicial bypass procedure, a procedure which, as discussed, is missing from the parental notification provision in Idaho's current abortion statute. The bill provides that the attending physician performing an abortion must obtain the informed written consent of the minor and the minor's "parent or guardian." In the definitions contained at Section I of the bill, "parent" is defined as meaning "both parents." This bill is not a one-parent consent bill, but instead requires the consent of both parents. As noted, the United States Supreme Court has upheld laws which require a minor to obtain the consent of one parent before obtaining an abortion, as long as those laws contain an adequate judicial bypass procedure. Casey, 505 U.S. at 899. However, this bill requires the consent of both parents. Research discloses a split of authority on whether a state may require the consent of both parents. For example, in Planned Parenthood League of Massachusetts, Inc. v. Attorney General, 677 N.E.2d 101 (Mass. 1997), the Supreme Court of Massachusetts invalidated a law requiring a pregnant unmarried minor to obtain the consent of both parents, holding that it violated her constitutional rights under the federal Constitution. In reaching that decision, the court noted that, "of the states that have a two-parent consent provision, almost all do not enforce it or have been enjoined from enforcing it." *Id.* at 107, n.11. However, the Fifth Circuit Court of Appeals upheld a statute requiring the consent of two parents in Barnes v. State of Mississippi, 992 F.2d 1335 (5th Cir.), *cert. denied*, 510 U.S. 976, 114 S. Ct. 468, 126 L. Ed. 2d 419 (1993). There is legal precedent on both sides of this issue. Idaho, however, is in the Ninth Circuit, which may be more likely than other federal circuits to overturn a two-parent consent provision.[3]

Section IV of the draft bill amends Idaho Code § 18-1609(3) to make clear that a physician who fails to comply with the informed consent provisions of Idaho's current law is subject to a misdemeanor penalty and may also be disciplined for unprofessional conduct. However, the bill does not clearly identify an enforcement mechanism for the additional duties it imposes.

As discussed, this draft bill imposes a series of new duties upon physicians; viability testing before aborting a fetus of 20 or more weeks gestational age, the presence of two physicians when a viable unborn child is aborted, the submission of tissue for a pathology test, and various recordkeeping and reporting requirements. The draft bill does not expressly provide whether a physician or abortion provider would also be criminally liable for violating or failing to perform any of the additional duties imposed by the draft bill. The additional duties created by this draft bill raise the same ambiguity as the current informed consent provision of Idaho Code § 18-609. The new misdemeanor provision only applies to Idaho Code § 18-609(3). Under the law already in place, Idaho Code § 18-605 makes it a felony for anyone to produce an abortion "except as permitted by this Act." The question arises as to whether the felony provision of Idaho Code § 18-605 would apply to the new requirements of the Act or whether no penalty was intended.

Added to this is the Eighth Circuit's opinion in Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452 (8th Cir. 1995), *cert. denied*, — U.S. —, 116 S. Ct. 1582, 134 L. Ed. 2d 679 (1996), in which the Eighth Circuit held that it was unconstitutional for the state of South Dakota to impose criminal liability against physicians who violate abortion laws without also including a *mens rea* or *scienter* requirement. "*Mens rea*" and "*scienter*" are legal terms for a defendant's guilty state of mind or guilty knowledge. The Eighth Circuit Court of Appeals concluded that a strict criminal liability statute would have a profound chilling effect on the willingness of physicians to perform abortions and would thus create a substantial obstacle to a woman's right to have an abortion. The felony provision of Idaho Code § 18-605 does not contain a *scienter* requirement. If Idaho Code § 18-605 were deemed to apply to the new duties and requirements created by this draft bill, a court could conclude the bill creates a chilling effect on the willingness of physicians to perform abortions in this state. It may well be that the authors of this draft bill do not intend for any criminal penalties to apply to the new duties. However, because this bill is drafted so as to be placed within the criminal code, it would be advisable for the authors to clarify this issue.

A second problem concerns the misdemeanor language the draft bill adds to the current informed consent provision. While this new language contains a *scienter* requirement, this requirement would not apply in all circumstances. The draft bill states that if the "attending physician's agent" fails to perform one of the requirements of the informed consent section, the "attending physician" is guilty of a misdemeanor. A situation could arise where a physician is unaware that his agent failed to fulfill the informed consent requirements and, yet, pursuant to the bill, the physician could still be held criminally liable for the agent's acts. This transferred responsibility, as it were, again creates strict criminal liability on the part of the attending physician. While the drafters of this bill may be concerned that physicians should exercise proper control over their agents, the principles articulated by the Eighth Circuit appellate court in Miller still need to be considered. With that opinion in mind, and considering the close scrutiny given such statutory language by the courts, the drafters may wish to avoid the creation

of a strict liability criminal offense in the abortion context. The drafters may want to consider including a gross negligence *scienter* requirement for those instances when a physician has not properly supervised his or her agent, and the agent knowingly violates the requirements of Idaho Code § 18-609(3).

Section V of the draft bill imposes a series of physician duties. These duties include viability testing if the fetus is 20 or more weeks gestational age, a requirement that, when a viable fetus is to be aborted, a second physician be present in order to seek to preserve that unborn child's life, and a requirement that sample tissue removed at the time of the abortion be submitted to a board-certified pathologist for examination. These provisions are similar in language to provisions which have been upheld by the United States Supreme Court in Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476, 103 S. Ct. 2517, 76 L. Ed. 2d 733 (1983), and Webster v. Reproductive Health Services, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989). Because identical language to that in the draft bill has already been upheld by the United States Supreme Court, in my opinion these provisions do not violate the federal Constitution.

Section VI contains a reporting requirement. It requires that a report of each abortion performed be made to the Idaho Department of Health and Welfare. These reports do not identify the individual patient by name. They would include the identity of the physician who performed the abortion, the second physician as required by subsection 18-616(B), the pathologist as required by subsection 18-616(C), the facility where the abortion was performed and the referring physician's agency or service, if any; the county and state in which the woman resides; the woman's age; the number of prior pregnancies and prior abortions of the woman; the viability and gestational age of the unborn child at the time of the abortion, including tests and examinations and the results thereof upon which the viability determination has been made; the type of procedure performed or prescribed and the date of the abortion; preexisting medical conditions of the woman which would complicate pregnancy, if any, and if known, any medical complication which resulted from the abortion itself; if applicable, 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 woman or the substantial and irreversible impairment of a major bodily function of the woman; the weight of the aborted child; the basis for any medical judgment that a medical emergency existed which excused the physician from compliance with any provision in the chapter; and whether the abortion was performed upon a married woman. In addition, every facility in which an abortion is performed within the state must file with the department a report showing the total number of abortions performed within the facility during that quarter year. This report must also show the total abortions performed during the quarter according to each trimester of pregnancy. If the facility receives public funds, this report is available for public inspection and copying.

These reporting requirements are similar to the requirements at issue in Planned Parenthood v. Casey. The reporting requirements at issue in Casey were upheld by the United States Supreme Court against a federal constitutional challenge with one narrow exception. The statute in Casey contained a requirement, at subsection 12, that the facility report whether the abortion "was performed upon a married woman and, if so, whether notice to her spouse was given." If no notice to her spouse was given, the report was also to "indicate the reason for the failure to provide notice." The Supreme Court invalidated this provision because it required a woman, as a condition of obtaining an abortion, to provide the state with the precise information that, as the court had already recognized, many women have "pressing reasons not to reveal." This draft bill has essentially included the first part of subsection 12, "whether the abortion was performed upon a married woman," but deleted the second part of that subsection, whether the married woman gave notice to her spouse and, if not, why. While the Court focused upon only a portion of subsection 12, it bears noting that the Court's holding may have invalidated all of that subsection.

Further, when the Third Circuit Court of Appeals reviewed the reporting requirements in Casey, it noted that the reports were "concededly confidential." Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 716 (3rd Cir. 1991). It also noted that the United States Supreme Court had struck down similar reporting requirements because they were not confidential in that they made public information about both the woman and about her physician. *Id.* at n.29. It is not clear whether these reports are intended to be made available to the public. Under existing law, the reports would probably be exempt from disclosure pursuant to Idaho Code § 9-340(3)(m) of the Public Records Act. However, the drafters may want to clarify this issue to avoid possible constitutional problems.[4]

B. Partial Birth Abortion Prohibition

The next draft bill this opinion will address is RS 07503, which prohibits partial birth abortions unless the woman's life is endangered. Pursuant to the draft bill, a physician who performs a partial birth abortion would be subject to felony prosecution and civil liability. The bill defines partial birth abortion as an abortion "in which the person performing the abortion partially vaginally delivers a living fetus, or a substantial portion of the fetus, for the purpose of performing a procedure the physician knows will kill the fetus, and which kills the fetus."

Partial birth abortion bans are a recent development in the abortion law area. Approximately 17 states have sought to ban these types of abortions. There have been several judicial challenges which have successfully enjoined the bans or had them declared unconstitutional.

"Partial birth abortion" is not a medical term. Usually, what legislators seek to ban when using this term is what is called a dilation and extraction (D&X) abortion. However, these bans have been construed to also encompass a dilation and evacuation (D&E) abortion. *See* Women's Medical Professional Corporation v. Voinovich, *supra.* The D&E procedure is the most common method of abortion in the second trimester. The D&X procedure, while apparently less common, is also sometimes used in the second trimester. In addition, partial birth abortion bans have been construed to ban the induction method of abortion. *See* Planned Parenthood of Southern Arizona, Inc. v. Woods, No. 97-385-TUC-RMB, 1997 WL 679921 (D. Ariz. Oct. 27, 1997).

Courts reviewing partial birth abortion bans have invalidated them primarily on the grounds that they potentially endanger the woman's health. Courts have reasoned that a particular abortion procedure cannot be banned if the alternative method would increase the health risks to the mother. *See, e.g.,* Voinovich, *supra,* and Carhart v. Stenberg, 972 F. Supp. 507 (D. Neb. 1997). Courts have also invalidated these bans on the theory that they are void for vagueness and overbroad. *See* Woods, *supra,* and Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997). These courts have concluded that it is not clear precisely what type of abortion procedure is being banned, and, therefore, physicians are not given fair notice regarding what is prohibited. As noted above, Ohio is seeking Supreme Court review of the Sixth Circuit Court of Appeals opinion striking down Ohio's law. The Supreme Court has not yet granted or denied review.

Idaho is in the Ninth Circuit, which is more likely than other circuits to follow a rationale similar to that applied by the Sixth Circuit. Consequently, particular attention should be paid to the Sixth Circuit opinion.

C. Parental Consent to Abortion

The third draft bill this opinion will address is entitled "Parental Consent To Abortion." This draft bill requires that before a physician performs an abortion on an unemancipated minor, the physician must secure the written consent of one parent of the minor. In addition, the consent of a guardian or conservator must be secured if one has been appointed because the pregnant woman has been found disabled, incapacitated or mentally ill pursuant to title 15, chapter 5, or title 66, chapter 3, Idaho Code. The draft bill contains a judicial bypass provision, criminal and civil penalties and recordkeeping and reporting requirements.

As discussed, the United States Supreme Court has upheld one-parent consent requirements. This draft bill, however, also appears to apply to adult women who have been found disabled, incapacitated or mentally ill and for whom a guardian or conservator has been appointed. Research discloses little precedent on this specific issue. Usually, legal cases involving a pregnant disabled, incapacitated or mentally ill woman entail an effort by a third party to sterilize the woman or force an abortion, rather than a

situation where the woman might seek an abortion while her legal guardian or conservator objects. *See* Lefebvre v. North Broward Hospital District, 566 So. 2d 568 (Fla. Ct. App. 1990) (trial court authorization allowing hospital to terminate pregnancy over mental patient's objection reversed). A court might not view a child and an adult woman who is incapacitated, disabled or mentally ill as being in identical situations. Title 66, chapter 3 may be particularly problematic. Under title 66, chapter 3, a court can find a woman "lacks capacity" if, because of her mental illness, she is not able to make an informed decision about treatment for her mental illness. *See* Idaho Code § 66-317(i). However, this woman may not have been adjudicated as incompetent. An incompetency adjudication is an entirely separate proceeding. *See* Idaho Code § 66-355. Idaho Code § 66-322 provides for the "appointment of [a] guardian for individuals lacking capacity to make informed decisions about treatment," and gives this guardian the narrow authority to "consent to treatment, including treatment at a facility." Idaho Code § 66-322(j). Idaho Code § 66-346 provides that mental patients retain all "civil rights . . . unless limited by prior court order." If this draft bill were enacted and judicially challenged, a court might be troubled by the prospect of a woman who has been found lacking capacity for the narrow purpose of making decisions about her treatment for a mental illness being required to obtain a guardian's consent or to seek judicial authorization before she can exercise her right to end a pregnancy.

The draft bill provides for a judicial bypass. The United States Supreme Court has held that a judicial bypass provision must meet four criteria: (i) allow the minor to bypass the consent requirement if she establishes that she is mature enough and well enough informed to make the abortion decision independently; (ii) allow the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests; (iii) ensure the minor's anonymity; and (iv) provide for expeditious bypass procedures. *See* Lambert v. Wicklund, — U. S. —, 117 S. Ct. 1169, 137 L. Ed. 2d 464 (1997).

The bypass provision in this draft bill is modeled upon the one upheld in Hodgson v. Minnesota, 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990). Under the bypass provision a judge "shall" authorize the abortion without parental consent if the judge concludes that that pregnant female is mature and capable of giving informed consent or the judge determines the abortion without parental consent would be in her best interests. The pregnant female may participate in the proceedings and she has the right to court-appointed counsel. The proceedings in court are confidential and the pregnant female has the right to an expedited confidential appeal if her petition is denied. Further, "to protect the identities of persons involved, records contained in court files regarding judicial proceedings . . . are exempt from disclosure pursuant to section 9-340D, Idaho Code."[5] No filing fees are required of the pregnant female at the trial or at the appellate level.

Generally, this bypass procedure appears sound. One minor point concerns the expediency of the hearings. The draft bill provides that the proceedings shall be "given

precedence" over other pending matters and that the judge shall render his decision "promptly." It goes on to provide for an "expedited" appeal. Further, the bill provides that access to the courts "shall be afforded the pregnant female twenty-four (24) hours a day, seven (7) days a week." However, the bill does not contain a specific time frame within which the courts must conduct hearings and render their decisions. The judicial bypass provision upheld in Hodgson also did not contain specific time frames, but it provided not only that the judge had to reach a decision promptly, but also that it had to be "without delay." Since Hodgson, one appellate court has held that a bypass procedure that allowed for "summary proceedings," but which did not set forth a specific timetable did not meet constitutional requirements. *See* Causeway Medical Suite v. Ieyoub, 109 F.3d 1096 (5th Cir. 1997). The court in this case cited an earlier Ninth Circuit opinion, Glick v. McKay, 937 F.2d 434 (9th Cir. 1991), as authority. Glick v. McKay has since been criticized by the Supreme Court on other grounds. *See* Wicklund, *supra*. Regardless, because Idaho is situated in the Ninth Circuit, it would do no harm to add a specific timetable.

The draft bill further provides that "performance of an abortion in knowing or reckless violation of this act shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied the right to consent." The draft bill does not specify precisely who would be liable—the physician or also his or her agents. I mention this because in a recent title challenge to an abortion initiative, the Idaho Supreme Court interpreted a provision that stated that the "mother, the father (and if the mother or father has not attained the age of 18 at the time of the abortion, any parent of such minor), may in a civil action obtain appropriate relief." Matter of Writ of Prohibition, 128 Idaho 266, 269, 912 P.2d 634, 637 (1995). The Idaho Supreme Court construed this provision as allowing for a civil action against anyone who violated the terms of the initiative, not just the "medical abortion provider." If the drafters intended to limit liability to the physician, it would be well to specify this.

I would also briefly note that the draft bill does not place any limit on the amount of civil damages which may be recovered. Further, under its terms, it would seem that a guardian or conservator, as well as a parent, could initiate a civil suit. Considering the admonishment from appellate courts since Casey that states not "chill" the willingness of physicians to perform abortions, these are details that the drafters of this bill may want to consider adding.

The draft bill also provides reporting requirements. As noted, in Casey, the Supreme Court upheld reasonable reporting requirements that protected the identity of the woman. Further, as discussed above, there is some precedent for the proposition that the identity of the physician should be protected from public disclosure as well. This draft bill shields the identity of the woman. While the physician's identity can undoubtedly be required on a reporting form submitted to the state, there may be constitutional problems if the physician's identity is then revealed to the public. This bill

does not appear to require that the physicians' names be protected by the department when the department compiles statistical data available for public inspection. Again, the Public Records Act may protect the physician's name, Idaho Code § 9-340(3)(m), but this issue could be clarified.[6]

Question No. 4:

Your final question concerns the Idaho Constitution. You have asked whether the Idaho Constitution creates any rights or limits that pertain to the state's ability to regulate abortion.

This office, in its 1993 Attorney General Opinion, touched briefly on this issue, discussing whether the Idaho Supreme Court might construe the Idaho Constitution as being more restrictive of the legislature's ability to enact abortion legislation than the federal Constitution has been construed to be. The Idaho Supreme Court has held that it may afford citizens greater protection under the Idaho Constitution than is afforded under the United States Constitution. *See*, *e.g.*, State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992). Since the Casey decision was issued, there have been several state supreme courts that have construed their state constitutions as providing broader abortion rights, and, consequently, less legislative discretion, than does the United States Constitution. For example, the California Supreme Court has held that a statute requiring a pregnant minor to secure parental consent or judicial authorization before obtaining an abortion violates the right of privacy guaranteed by the California Constitution. American Academy of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997). The Supreme Court of Minnesota has held that medical assistance and general assistance statutes that permit the use of public funds for child-related medical services, but prohibit similar use of public funds for medical services related to therapeutic abortions impermissibly infringe on a woman's fundamental right of privacy under the Minnesota Constitution. *See* Women of the State of Minnesota v. Gomez, 542 N.W.2d 17 (Minn. 1995). However, there are other states which have not followed this course. For example, in Mahaffey v. Attorney General, 564 N.W.2d 104 (Mich. Ct. App. 1997), the Court of Appeals of Michigan held that the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right.

These cases highlight the point that the Idaho Supreme Court, should an abortion issue be raised before it, will not necessarily conclude that it must follow federal precedent. I note that one state district court judge, when addressing an abortion issue, held that the Idaho Constitution provides "broader protection than the federal constitution." *See* Roe v. Harris, No. 96977 (Idaho Fourth District for Ada County, Feb. 1, 1994). Whether the Idaho Supreme Court would reach the same conclusion remains an open question.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 9-340(3)(m).
Title 15, chapter 5.
§ 18-601, *et seq.*
§ 18-604(6).
§ 18-604(7).
§ 18-605.
§ 18-608.
§ 18-608(2).
§ 18-608(3).
§ 18-609.
§ 18-609(2).
§ 18-609(3).
§ 18-609(4).
§ 18-609(6).
§ 18-1609(3).
§ 39-3801.
§ 39-4302.
Title 66, chapter 3.
§ 66-317(i).
§ 66-322.
§ 66-322(j).
§ 66-346.
§ 66-355.
§ 67-1401.
§ 67-1401(7).

2. Idaho Cases:

Bon Appetit Gourmet Foods, Inc. v. State, Dept. of Employment, 117 Idaho 1002, 793 P.2d 675 (1989).

Matter of Writ of Prohibition, 128 Idaho 266, 912 P.2d 634 (1995).

Roe v. Harris, No. 96977 (Idaho Fourth District for Ada County, Feb. 1, 1994).

State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992).

3. Federal Cases:

Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983).

Barnes v. State of Mississippi, 992 F.2d 1335 (5th Cir.), *cert. denied,* 510 U.S. 976, 114 S. Ct. 468, 126 L. Ed. 2d 419 (1993).

Carhart v. Stenberg, 972 F. Supp. 507 (D. Neb. 1997).

Causeway Medical Suite v. Ieyoub, 109 F.3d 1096 (5th Cir. 1997).

Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997).

Glick v. McKay, 937 F.2d 434 (9th Cir. 1991).

Hodgson v. Minnesota, 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990).

Lambert v. Wicklund, — U. S. —, 117 S. Ct. 1169, 137 L. Ed. 2d 464 (1997).

Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476, 103 S. Ct. 2517, 76 L. Ed. 2d 733 (1983).

Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 655 F.2d 848 (8th Cir. 1981).

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682 (3rd Cir. 1991).

Planned Parenthood of Southern Arizona, Inc. v. Woods, No. 97-385-TUC-RMB, 1997 WL 679921 (D. Ariz. Oct. 27, 1997).

Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452 (8th Cir. 1995), *cert. denied,* — U.S. —, 116 S. Ct. 1582, 134 L. Ed. 2d 679 (1996).

Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

Webster v. Reproductive Health Services, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989).

Women's Medical Professional Corporation v. Voinovich, 130 F.3d 187 (6th Cir. 1997).

4. Other Cases:

American Academy of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997).

Lefebvre v. North Broward Hospital District, 566 So. 2d 568 (Fla. Ct. App. 1990).

Mahaffey v. Attorney General, 564 N.W.2d 104 (Mich. Ct. App. 1997).

Planned Parenthood League of Massachusetts, Inc. v. Attorney General, 677 N.E.2d 101 (Mass. 1997).

Women of the State of Minnesota v. Gomez, 542 N.W.2d 17 (Minn. 1995).

5. Other Authorities:

1993 Idaho Att'y Gen. Ann. Rpt. 5.

IDAPA 16.02.08.451.

Dated this 26th day of January, 1998.

Sincerely,

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Idaho Attorney General

Analysis by:

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[1] Because this is an important constitutional issue which needs to be resolved one way or the other by the United States Supreme Court, this office is joining in an *amicus* effort by the state of Arizona asking the Supreme Court to resolve the issue.

[2] This office notes that it has never been contacted to prosecute an individual under the statutes which carry criminal penalties.

[3] It is absolutely imperative that any bypass procedure protect the confidentiality of the minor. Lambert v. Wicklund, — U. S. —, 117 S. Ct. 1169, 137 L. Ed. 2d 464 (1997). The draft bill provides that the minor shall file her petition in the judicial bypass proceeding using her initials. While language similar to that contained in this draft bill was upheld in Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476, 103 S. Ct. 2517, 76 L. Ed. 2d 733 (1983), it might be well to specify within the draft bill that both the trial and appellate procedures must be confidential and that court documents are not public records. In addition, for purposes of further clarification, the drafters may want to define what is meant by "notice" in Section III, specifically, (6)(b)(i). An earlier version of the statute at issue in Ashcroft contained a provision that notice be provided to the minor's parents regarding the bypass hearing. This provision was struck down by the Eighth Circuit in Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 655 F.2d 848, 874 (8th Cir. 1981), and the state of Missouri did not raise this issue on appeal and appears to have dropped that provision in its current statute. Bearing in mind the origins of the word "notice," clarification by the drafters might be considered.

[4] Current rules promulgated by the Department of Health and Welfare protect a physician's identity when reports of "induced abortion" are released for public use. IDAPA 16.02.08.451. The draft bill does not provide whether the department should continue this confidentiality policy with regard to the reporting requirements contained in the draft bill.

[5] Proposed section 39-1704(3) appears to include a typographical error. The drafters may have intended just 9-340, or some other specific section under that statute.

[6] This opinion notes one final issue regarding both the draft bills which require parental consent. Idaho does not require parental consent for medical treatment for minors "14 years of age or older" who may have come into contact with infectious, contagious or communicable disease that are required by law to be reported to the local health officer. *See* Idaho Code § 39-3801. Idaho Code § 39-4302 allows persons to consent to their own care if they are of "ordinary intelligence and awareness sufficient for him or her generally to comprehend the need for, the nature of and the significant risks ordinarily inherent in any contemplated hospital, medical, dental or surgical care, treatment or procedure." The code does not appear to require that minors obtain parental consent prior to medical procedures. The United States Supreme Court has never held that a state must require parental consent for other medical procedures before it can require a one-parent consent to an abortion procedure. Nevertheless, if a challenge were made based on the Idaho Constitution, a court, should it construe the Idaho Constitution more broadly than the U.S. Constitution (see discussion below), could find this distinction relevant.