Reg. 5132

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

November 27, 1995

The Honorable Michael T. Rose
Senator, District No. 38
409 Central Avenue
Summerville, South Carolina 29483

The Honorable James S. Klauber
Member, House of Representatives
406 E. Henrietta Avenue
Greenwood, South Carolina 29649

Re: Informal Opinion

Dear Senator Rose and Representative Klauber:

You have sought our advice as to whether the Department of Health and Environmental Control (DHEC) can constitutionally promulgate certain regulations related to abortion clinics. The first regulation would require a sonogram (ultrasound) examination where gestational development is thought to be at least ten weeks from the date of conception. The second proposed regulation would require that all complaints against abortion clinics would be reported to DHEC, preferably in writing and would contain sufficient facts to facilitate the investigation.

It is also my understanding that DHEC is proposing to promulgate a number of other regulations concerning the licensing of facilities which perform abortions. With respect to such facilities, S.C. Code Ann. Sec. 44-41-75(B) states that

> [t]he department shall promulgate regulations concerning sanitation, housekeeping, maintenance, staff qualifications, emergency equipment and procedures to provide emergency care, medical records and reports, laboratory, control and information on and access to patient follow-up care necessary to carry out the purposes of this section.

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Section 44-7-150(3) also authorizes DHEC to promulgate regulations concerning standards for hospitals. That provision states that the Department may

> (3) adopt in accordance with Article I of the Administrative Procedures Act substantive and procedural regulations considered necessary by the department and approved by the board to carry out the department's licensure and Certificate of Need duties under this article, including regulations to deal with competing applications;

It is my information that DHEC's proposed regulations regarding the licensure of facilities which perform abortions during the first and second trimester are being promulgated pursuant to Sections 44-41-10 et seq. and 44-7-110 et seq.

As a caveat, I would state at the outset that, it is obviously not the province of this Office to comment upon the policy considerations or wisdom of a particular regulation promulgated by an administrative agency. As we have stated on numerous occasions, an administrative agency is afforded considerable discretion in the regulatory process. State law does not authorize this Office to supersede the administrative agency's authority or the discretion of that agency possessed with the expertise to promulgate regulations. Courts, as well as legal opinions of the Office of the Attorney General, must as a matter of law afford considerable latitude to the agency's discretion. See, Op. Atty. Gen., August 21, 1991. Such regulations generally are deemed to stand unless they are in contravention of or lacking in statutory authority or inconsistent with the federal or state Constitutions. An agency's regulations are presumed valid until challenged. U.S.C. v. Batson, 271 S.C. 242, 246 S.E.2d 882 (1978) (Littlejohn, J. concurring).

Moreover, this Office possesses no authority to declare either a statute or administrative regulation invalid. At most, we may simply comment upon and point to any constitutional or legal problems which may be encountered as a result of the enforcement of such laws. Only the courts can declare a statute or regulation to be inconsistent with the Constitution.

You note in one of your letters that you are seeking an opinion "that would determine the constitutionality of the most conservative and strict regulations available." You further stated that "[i]t is not my desire to violate the constitution and the United States Supreme Court's decision regarding abortion, but I would like the strictest regulations that are within constitutional parameters."

BACKGROUND:
Planned Parenthood v. Casey

Planned Parenthood v. Casey, _____ U.S. _____, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1974) represents the United States Supreme Court's current thinking and legal analysis in the area of abortion regulation. In Casey, the Court reaffirmed the central holding of Roe v. Wade, 410 U.S. 113 (1973), but enunciated certain major departures therefrom. The essence of the Court's analysis in Casey is as follows:

> [i]t must be stated at the outset and with clarity that Roe's essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. ...

120 L.Ed.2d at 694.

While Casey reaffirmed the essence of Roe's analysis, it rejected substantial parts of the holding, namely Roe's strict adherence to and analysis based upon the trimester system. Explained the Court's joint decision,

> Roe established a trimester framework to govern abortion regulations. Under this elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake.

> The trimester framework no doubt was erected to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact. We do not agree, however, that the trimester approach is necessary to accomplish this objective.

Id. at 711.

Under the Court's new Casey analysis, therefore, the State maintains a legitimate interest from the outset of pregnancy in protecting the mother's health as well as in the life of the child. Said the Court,

> [T]hough the woman has a right to choose to terminate her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoptions of unwanted children as well as a certain degree of state assistance if the mother refuses to raise the child herself. "'[T]he Constitution does not forbid a State or city, pursuant to the democratic processes from expressing a preference for normal childbirth.'"

Id. at 712. (emphasis added).

Thus, concluded the Court, once the trimester framework is abandoned, a State's regulations relating to abortion can be analyzed with considerably greater flexibility than under previous decisions. Constitutional analysis was, therefore, modified by the Court in Casey. The Court, in that vein, reasoned as follows:

> [n]umerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental

> effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

(emphasis added). Id. at 712-713.

The "undue burden" standard, by its very nature, meant that not all regulations were invalid; instead, many would now meet constitutional standards. This was a recognition that "the Court's experience applying the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision. Those decisions went "too far ...." The "undue burden" standard was described as follows:

> [a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

Id. at 715. Applying this "undue burden" standard, the Court recognized the importance of protecting not only the life of the fetus, but the health of the mother, from the outset of pregnancy.

> (c) [a]s with any medical procedure, the state may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of preventing a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

Thus, as a general matter, unless the State's regulation "imposes an undue burden on a woman's ability to make [the abortion] decision", such regulation is constitutionally valid. Applying this standard, the Court in Casey upheld Pennsylvania's statute requiring that, except in a medical emergency, a waiting period of at least twenty-four hours was to be imposed before permitting an abortion, in order to inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth and the probable gestational age of the unborn child. Also upheld was the requirement that the woman be informed of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support and a list of agencies that furnish adoption and services which are an alternative to abortion. Further, the Court upheld a parental consent provision with an adequate judicial bypass procedure, while declaring invalid a spousal notice procedure. Finally, the Court held to be constitutional extensive record keeping requirements. As to the latter, the Court rejected the argument that such a record keeping mandate impermissibly increased the cost of an abortion:

> we [have held] that record keeping and reporting provisions "that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." We think that under this standard, all the provisions at issue here except that relating to spousal notice are constitutional. Although they do not relate to the State's interest in informing the woman's choice, they do relate to health .... Nor do we find that the requirements impose a substantial obstacle to a woman's choice. At most they might increase the cost of some abortions by a slight amount. While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.

Id.

With a recognition that Casey now represents the governing law in the area of the State's authority to regulate abortions as well as those facilities which perform abortions, we turn to your specific questions.

Requirement of Sonography

As I understand it, the DHEC proposed regulations require an ultrasound test at the twelfth week of pregnancy. Your concern is whether such test can be required at ten weeks.

There is no real question regarding the value of the ultrasound or sonogram to the attending physician as a tool of medical care during pregnancy, regardless of whether an abortion is contemplated. It is stated that

> [a] sonogram or ultrasound provides the physician with a video image of the fetus .... From this image, the physician is able to measure the head size (anterior, posterior, and lateral), the abdominal size, and the femur length of the fetus .... These measurements are typically entered into a computer to calculate the approximate age of the fetus based on gestational development .... In fact, many physicians now conduct a sonogram as a matter of course prior to performing an abortion in order to determine the age of the fetus and thereby ensure compliance with the trimester framework outlined in Roe v. Wade ....

Trense, Jr., "The Aftermath of Casey: Is a Sonogram Requirement Unduly Burdensome?" 17 Law and Psychology Rev. 225 (Spring, 1973).

It is further emphasized elsewhere:

> [o]bviously, the diagnosis of the gestational age of the fetus is of paramount significance. This is a task which is best begun early in the pregnancy through serial examinations of the mother and the careful taking of a detailed menstrual history. Sonography should be used when the fetal age has not been established in this manner.

Gordy-Gray, Attorney's Textbook of Medicine, § 305 A.02 (Vol. 4C) (1993).

Sonography particularly plays a major part in maintaining the health of the mother in performing abortions. The lower court in Planned Parenthood v. Casey, 744 F.Supp. 1323 (E.D. Pa. 1990), as part of the Court's Findings of Fact, determined that many of

the clinics who were parties in the case performed sonograms routinely. See, Findings of Fact No. 317 ("[f]or abortions from 12 to 16 weeks from the last menstrual cycle an ultrasound is required at RHCC."); No. 318 ("[a]t Magee, an ultrasound or sonogram is used to determine gestational age for pregnancies beyond 12 weeks."); No. 319 ("[a]t WHS, an ultrasound or sonogram is used to determine gestational age for any pregnancies beyond 14 weeks."); No. 321 ("... if AWC is unclear of the length of the woman's pregnancy, it will do a sonogram." The Court further noted that

> [a] determination of probable gestational age is part of the routine care of a pregnant woman, regardless of whether she is considering terminating her pregnancy. In the abortion context, an accurate determination of gestational age is relevant to the physician's choice of abortion procedure and the selection of the incorrect procedure could increase the complications for the patient ....

Id. at 1389.

Moreover, a leading treatise on abortion practice recognizes the importance of sonography as part of the maintenance of the health of the pregnant woman. It is stated therein that

> [f]irst trimester patients who are found to be 11 to 12 weeks gestational size corresponding to the reported menstrual dates of 11 to 12 weeks from the last menstrual period should be given an ultrasound examination if there is any doubt in the examiner's mind concerning the actual length of pregnancy. The examiner should be particularly alert to the possibility that patients at this stage may have a one month discrepancy between dates and actual gestational length. It is very easy to mistake a 16 week pregnancy for a 12 week pregnancy at this state.

Hern, Abortion Practice, p. 70 (1990). Further, this same expert (Dr. Warren M. Hern, M.D.) writes:

> [s]onographic examination is invaluable for a variety of reasons. Aside from a more accurate assessment of fetal age than other methods, it provides information concerning fetal

> presentation, placental location, multiple gestations, and such unexpected conditions as hydatiform mole, myomas, uterine structural abnormalities and extrauterine lesions (e.g. ovarian cysts). Many of these data can affect clinical management in important ways .... While ultrasound is not perfect, it appears to be considerably more accurate for determining fetal age than menstrual dates and even a careful examination by an experienced physician ... an error of 2 mm to 3 mm can be very serious, and it is not difficult to be in error more than 5 mm. However, most ultrasonic evaluations are accurate to within 1 mm to 2 mm. when performed by an experienced person. The differences between clinical impressions and sonography results proved by tissue examination are sometimes astonishing.

Id. Thus, it is quite evident that the use of sonography as a significant tool in the care for the mother during pregnancy--whether or not she intends to terminate that pregnancy--is well recognized. Moreover, where termination is intended, sonography appears to take on an additional important value.

There are very few cases which have analyzed the question whether or not a mandatory sonogram requirement is consistent with Roe v. Wade and its progeny. I have located only one decision which addresses this question directly. In Margaret S. v. Treen, 597 F.Supp. 636 (E.D. La. 1984), affd. 794 F.2d 994 (5th Cir. 1986), a provision of Louisiana law required the attending physician in an abortion procedure to perform an ultrasound test upon the pregnant woman before carrying out the abortion procedure.[1] The Court noted that the issue was one of first impression.

It was contended that the ultrasound requirement imposed an undue burden upon the woman's decision as to whether to have an abortion. The Court concluded that, in fact, the requirement did place an undue burden upon the woman's decision because of the additional costs incurred. The reasoning of the Court was as follows:

> [t]he requirement that the attending physician in the abortion procedure also administer the ultra-sound test is an additional factor which would raise the cost of abortion.

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[1] The sonogram issue was not part of the appeal.

> Currently, a first trimester abortion can be performed in approximately five minutes, and a second trimester procedure in approximately ten minutes. The performance of an ultra-sound requires approximately twenty minutes. Thus, the statutorily imposed requirement that the attending physician perform the ultra-sound test would require the physician to spend an additional twenty minutes with each patient. Two physicians, as well as the administrator of an abortion clinic in Louisiana, stated at trial that this additional expenditure of time occasioned by the ultra-sound testing requirement would result in higher costs for abortion services.

597 F.Supp. at 646. The State argued that increased costs imposed by an ultrasound requirement had no constitutional significance, and such a requirement did not constitute a direct interference with the woman's right to choose. However, the Court concluded otherwise, reasoning that if the rule were as the State claimed, "the state would be free to add on any costly requirements under the guise of regulation, and would not be required to justify these requirements by a compelling state interest." 597 F.Supp. at 647. Concluding that the sonogram requirement constituted a direct burden on the constitutional right, the Court stated that the State "must demonstrate a compelling state interest which justifies this requirement." Id. at 648.

However, the Court held that the State failed to meet its burden because "it failed to demonstrate that such testing is medically necessary" to determine gestational age. Concluded the Court,

> [t]he testimony of several physicians indicated that overall, that is, throughout the course of a pregnancy, the clinical examination method and ultra-sound testing are comparable in their levels of accuracy and reliability as to gestational age. The overwhelming weight of the evidence further indicates that ultra-sound testing is not medically indicated for all pre-abortion cases; rather, the evidence indicated that ultra-sound testing is medically indicated in a selected number of cases where a discrepancy exists between a patient's menstrual history and the size of her uterus, where an unidentified mass is present, or where the patient has other abnormalities which impede the accuracy of clinical examination.

Id. Also rejected, based on the record, was the State's contention that ultrasound testing is necessary to determine life-threatening conditions such as atopic pregnancies.

Furthermore, the Treen Court noted that the State's interest in maternal health does not become "compelling" until the end of the first trimester. Referencing its earlier decision in Margaret S. v. Edwards, 488 F.Supp. 181 (E.D. La. 1980), that the State's compelling interest in maternal health "does not commence until abortion threatens maternal health in the same degree as does childbirth", the District Court had earlier held that the State "may not regulate abortion until the eighteenth week of pregnancy." 597 F.Supp. at 650. According to its earlier decisions, the Court had concluded that 93.3% of all abortions in Louisiana were performed by the end of the first trimester. Therefore, held the Court, the Louisiana statute requiring an ultra-sound examination on abortion patients "must fall."

> This result is dictated by the jurisprudence since the statute commands a physician to perform a specific diagnostic procedure which imposes significant costs upon the exercise of a woman's constitutionally protected right to obtain an abortion, and it is apparent that there is no legitimate compelling state interest justifying the requirement of such a test.

Id.

However, a good argument can now be made that the Treen case does not represent the current state of the law. Treen was certainly not a decision of this Circuit, but a Louisiana District Court case. It would clearly not be controlling as to South Carolina.

Moreover, this decision has undoubtedly been considerably undermined by the United States Supreme Court decision in Casey for a number of reasons. First, a principal underpinning of Treen was the fact that it imposed additional costs upon the abortion process. Casey specifically states that "[t]he fact that a law which serves a valid purpose, one designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." 120 L.Ed.2d at 712-713. Secondly, Casey specifically repudiates the trimester system analysis which Treen seems to have relied upon, basing such reliance upon earlier pre-Casey Supreme Court decisions. As the Court emphasized in Casey, a trimester framework, "misconceives the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in Roe." Treen, in essence held that the State "may

not regulate abortion until the eighteenth week of pregnancy," relying upon Margaret S., 488 F.Supp., supra at 195-196. Casey, however, explicitly emphasized that the State has legitimate interests "from the outset of pregnancy in protecting the health of the woman and the life of the fetus that may become a child." 120 L.Ed.2d at 694 (emphasis added). Therefore, concluded Casey, with respect to protecting the health of the woman, the State "may enact regulations to further the health or safety of a woman seeking an abortion" unless such regulations "have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion" and, therefore, "impose an undue burden on the right." Id. at 716. Thus, it is no longer crucial after Casey that the State's regulations for the preservation of the mother's health only begins in the second trimester.

Third, contrary to Treen, the Court in Casey recognized the importance of the State's interest in providing truthful, accurate information to the woman. While Treen stated that until the compelling point is reached, the abortion "may be effectuated without interference by the State according to the physician's medical judgment," the Court in Casey said this:

> [w]hatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position .... Thus, a requirement that a doctor give a woman certain information as part of her obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain information about any medical procedure.

Thus, the Casey Court concluded that the State's requirement that such information be provided to the woman prior to termination of pregnancy and that there be a 24 hour waiting period did not constitute an undue burden upon the woman's decision.

Fourth, while the Court in Treen found that an ultrasound or sonogram is not medically necessary, there appears to be significant evidence to the contrary. Ante. While this Office cannot determine facts in an opinion, there does seem to be considerable support for the view that a sonogram is medically indicated during pregnancy, particularly where the woman desires to terminate pregnancy beyond 11-14 weeks. In such event, a sonogram apparently serves an important medical purpose in protecting the health of the mother. This is another important distinction from Treen which required an ultrasound with respect to all abortions, not just those beyond a certain point in pregnancy.

Thus, a good argument can be made that Casey so undermines Treen that Treen provides no precedent for any conclusion that a requirement of an ultrasound at 10 weeks constitutes an undue burden upon the woman's decision. Treen is not only distinguishable on the facts (regulated all abortions, not just those post ten weeks), but Casey calls into considerable question Treen's reliance upon additional costs as a basis for striking down the requirement. Further, Casey certainly rebuts any conclusion that the health of the woman could not be significantly considered until the eighteenth week.

At least one commentator has argued that Casey may now permit a sonogram requirement even to the point of mandating that the sonogram be shown to the woman. See, Trense, Jr., supra. The author of that Comment recognized that the "additional cost of requiring a sonogram could arguably be sufficient to constitute an undue burden." Nevertheless, Trense argued, Casey may have removed a major part of any such contention:

> [t]he cost of a sonogram approximates $100, although in some instances Medicaid and/or insurance will cover the cost .... However, in Casey, the Court described the effect of increasing the cost of an abortion as an "incidental effect." ... The decision went on to say, "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or expensive to procure an abortion cannot be enough to invalidate it." ... Thus, added expense or inconvenience is not substantial enough to constitute an undue burden on a woman's ability to decide.

Id.

The commentator further pointed to other language in the opinion in Casey which was supportive of a mandatory sonogram which would serve not only as a health tool, but would provide the woman with important information she needed in making the decision whether to terminate her pregnancy. The Court in Casey had stated:

> [i]n attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect on abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the

> information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible ....

Argued Trense with respect to this language in Casey:

> [a]t first glance, this language would seem to be tacit approval for a sonogram requirement. After all, a sonogram is presumably more truthful and less misleading than the State-produced literature in Casey which was ostensibly designed to persuade a woman to decide against abortion. Few would argue that a sonogram is not informative. After all, physicians rely on the sonogram to detect fetal abnormalities and determine fetal age. Moreover, if the impact on the fetus is "relevant, if not dispositive," ... to the decision, then it would seem that a pregnant woman would want to view the fetus [or, alternatively, have in her possession the results of the sonogram] as it currently existed before deciding the impact of terminating its existence.

Id.

CONCLUSION

In summary, there are very few cases which have dealt with the constitutionality of a sonogram requirement, much less a ten-week requirement. Thus, this Office can obviously not predict with any certainty how the Courts will rule. The one case which has addressed the issue was based upon a statute which mandated sonograms in all cases, not those where pregnancy had progressed to ten weeks. That case found such a requirement to be an undue burden on the woman's right to decide whether to terminate her pregnancy, based primarily upon the imposition of additional costs and the fact that under then-existing law, courts were of the view that Roe did not allow state regulation for the health of the mother until well into the second trimester.

Casey, however may well have undermined the Treen case completely. A good argument can now be made that under Casey a ten-week sonogram requirement is constitutionally valid. It appears to me that this requirement not only promotes the health of the mother, but as well would be consistent with providing the woman truthful accurate medical information concerning the gestational age and development of the fetus, and

would be important to her in making an informed decision regarding whether or not to terminate pregnancy. While such a requirement does increase the costs of an abortion, based upon Casey, a good argument could be made that a sonogram requirement at ten weeks does not constitute an undue burden upon the woman's decision.

Complaint Against Doctor or Clinic To Be Made to DHEC

You have also inquired about whether a regulation which authorized complaints to be made to the Department, preferably in writing is constitutional under Casey. As I understand it, such a regulation would read as follows:

> [a]ll complaints against clinics shall be reported to the Department. Complaints should preferably be in writing and contain sufficient facts to facilitate the investigation. Complaints by telephone will be accepted. Complaints will be required in writing if needed to support legal action against the applicant.

In Casey, the Court reaffirmed its earlier holding in Planned Parenthood v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) where the Court had concluded that "record keeping and reporting provisions 'that are reasonably directed to the preservation of maternal health and that properly respect of a patient's confidentiality and privacy are permissible.'" Casey, 120 L.Ed.2d at 729-730. In Danforth, at issue was the State's requirement that health facilities and physicians be required to provide a wealth of data relevant to maternal health and life to assure that abortions are "'done only under and in accordance with the provisions of the law.'" 49 L.Ed.2d at 811. Pursuant to the Missouri law, while the data was to be used for statistical purposes only, the records could be inspected and health data "'acquired by local, state, or national public health officers.'" Id. Such records were required to be maintained for seven years.

The Danforth Court rejected the argument that such record keeping requirements imposed an undue burden on the abortion decision. However, the Court concluded:

> [r]ecord keeping of this kind, if not abused or overdone, can be useful to the state's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment.

Id.

Moreover, in Planned Parenthood v. Ashcroft, 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733, the Court upheld Missouri's requirement that tissue following abortions be submitted to a pathologist, not merely examined by the performing doctor. A copy of the tissue report was also mandated to be filed with the state division of health. Noting that such a requirement was particularly important following abortion, the Court emphasized:

> because questions remain as to the long range complications and their effect on subsequent pregnancies .... Recorded pathology reports, in concert with abortion complication reports, provide a statistical basis for studying those complications.

76 L.Ed.2d at 743. Further, Ashcroft noted that "not all abortion clinics, particularly inadequately regulated clinics, conform to ethical or generally accepted medical standards." Id. at n. 12.

Moreover, in Schulman v. NY City Health and Hosp. Corp., 38 N.Y.2d 234, 342 N.E.2d 501 (1975), the City of New York required that every termination of pregnancy be reported to the Department of Health within 24 hours of the person in charge of the hospital in which the abortion occurs. It was testified at trial that the purpose of the requirement, among other reasons, was to enable the Department of Health "to determine whether orthodox procedures were followed", and to enable the department "to determine whether further investigation or regulation is required."

Schulman held that New York's reporting requirement was consistent with Roe v. Wade, supra. Concluded the Court,

> [b]ecause of its slight, if any, impact on the abortion decision and procedures employed by physicians for first trimester abortions, ... the regulations challenged herein do not affect "whether and in what manner an abortion will take place .... To the contrary, the city has struck a meticulous balance between its public health interests and the constitutionality protected interests delineated in Roe v. Wade ....

Id at 505.

CONCLUSION

Again, there is no case directly on the second question you have raised and, thus, it is difficult to predict how a court will rule on the question. However, I cannot see where a complaint procedure whereby complaints are made to DHEC unduly burdens a woman's decision to terminate a pregnancy. Such a procedure clearly promotes maternal health. DHEC is indeed the agency which licenses abortion clinics, and it is certainly in the interest of the promotion of maternal health to have complaints made to that agency. The United States Supreme Court has consistently upheld reporting requirements which are not overly burdensome and which maintain confidentiality. I see little or no difference in this requirement and those previously upheld which require the information to be provided to or subject to inspection by health departments. If it is permissible to have data available to the State or local subdivisions so that adequate standards can be maintained, it would seem equally permissible that complaints regarding a facility could be made to the State. Thus, I believe a good argument could be made that such a provision is constitutionally valid.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an