1974 WL 27581 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
January 7, 1974

***1 Re: Proposed abortion Legislation**

Honorable Ralph K. Anderson, Jr.
Member
House of Representatives
P. O. Box 468
Florence, South Carolina 29501

Dear Mr. Anderson:
Your letter of December 11, 1973, and a copy of the proposed abortion legislation have been referred to me for reply. In the interest of clarity, the following observations are being made on a section by section basis.

Section 1. Inasmuch as this Section is a preamble or statement of intent, its constitutionality is not called into question; however, in view of the South Carolina Supreme Court's decision in State v. Lawrence, 261 S.C. 18, 198 S.E.2d 253 (1973), it can safely be said that South Carolina has no enforceable abortion laws.

Section 2(A). This provision purports to govern the abortion process without making an exception for the first trimester. The United States Supreme Court has ruled that during this period both the abortion decision and its effectuation must be left to the modical judgment of the pregnant women's attending physician. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 732, 35 L.Ed.2d 147, 183 (1973). Thus, aside from requiring that abortions be performed by licensed physicians, States may not regulate the process during the first trimester and this would preclude specification of the place where the procedure is to be performed.

Section 2(B). As to the establishment of twenty (20) weeks as a dividing line between trimesters, it would appear that such a standard is within the General Assembly's purview. The cut-off point, so to speak, established by the Court is viability, a term in need of clarification by medical testimony. The Supreme Court said that it (viability) is usually placed at about seven months (28 weeks) but may occur at 24 weeks. Id., 93 S.Ct. at 730, 35 L.Ed.2d at 181. Subsequent to viability, the State may regulate and even proscribe abortions except where the health and for life of the mother is endangered.

Section 2(C). As long as the privacy of the woman procuring the abortion is adequately protected, reporting provisions of the type contained herein are enforceable.

Section 2(D). Although 'conscience clauses' have been enacted by several states, this one presents some problem in that (1) it protects only physicians (2) that are not employees of licensed or certified hospitals. Usually, other hospital employees have also been afforded the right to refrain from participating in the abortion procedure. Second, the Department of Health and Environmental Control has a number of regulations pertaining to both certification and licensing of hospitals. (See also Section 32-781, South Carolina Code of Laws (1962) as amended.) The type of license or category of certification needs to be spelled out before any opinion can be expressed as to the efficacy of this section.

Section 2(E). In not restricting this exemption to private mongovernmental hospitals, this section creates the risk that South Carolina's public hospitals would be subject to civil liability under a state action theory for refusing to perform

abortion services. This would be especially true in areas which lack the appropriate public health facilities. Section 16-89 of the current abortion law makes this distinction between public and private facilities.

***2** Section 3. Section 16-83 was declared unconstitutional by the State Supreme Court in State v. Lawrence. It was the principal penal provision regulating abortions not resulting in death. To make the proposed legislation effective, it would be necessary to fill that void.

This office is in the process of drafting some abortion legislation. If you have any suggestions as to what it should include, we would appreciate hearing from you.
Sincerely,

Dudley Saleeby, Jr.
Assistant Attorney General

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