AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **SLI Supporters**
Date: **January 2015**
From: **A. Eric Johnston**
Re: ***Planned Parenthood v. Strange*** **– The Women's Health and Safety Act**

United States District Court Judge Myron Thompson issued an opinion on August 4, 2014, holding the physician admitting requirement of Alabama's Women's Health and Safety Act ("Act") unconstitutional. In a 172 page opinion, he went out of his way to build a factual record for his fallacious reasoning and predisposition for support of abortion. It is not Judge Thompson's first foray into the area and it was fully expected that he would strike down Alabama's law. When cases are tried without juries, appellant courts are unlikely to disturb factual findings and will concentrate on the legal issues. Judge Thompson is well aware of this and his 172 page opinion attempted to build a factual record that may be difficult to dispute on appeal. However, an objective reading of his opinion demonstrates his reliance on irrelevant facts and findings which, we hope, on appeal will be reversed.

The only issue before the court was whether the requirement of the Act for abortion doctors to have admitting or staff privileges at a local hospital is unconstitutional. Judge Thompson found the abortionists in Birmingham, Montgomery and Mobile would not qualify for staff privileges at hospitals in those cities and this would result in closing of abortion clinics. That, he held, would be a substantial obstacle to a woman's obtaining an abortion and therefore an undue burden under the *Planned Parenthood v. Casey* (1992) controlling U.S. Supreme Court precedent. The State of Alabama argued, as found by the Legislature, that improving and protecting women's healthcare was an important objective. Judge Thompson did not agree. He applied what he called the "real-world circumstance" that women would have to drive more than "59 miles" to get abortions if this law remains in effect. He determined that was too far to drive. But, the real meaning of his ruling is that having the availability of abortion is more important than having a competent physician/facility perform the abortion.

Judge Thompson relied on what he termed Alabama's "violence against and harassment of abortion providers, beyond run-of-the-mill political protest." He detailed isolated incidents of violence going back to 1993, all of which were extreme and exceptional; none were by the thousands of Alabama citizens who have daily opposed abortion, including those who have been on the sidewalks at the clinics, for all these years. That was the beginning of his opinion and he rehearsed the facts again later in the opinion. It was important to his reasoning that doctors do not want to do abortions in Alabama because of that. What that has to do with providing women a proper standard of healthcare is beyond rational reasoning. While the state argued that there needed to be a continuity of care and a proper credentialing of physicians, Thompson sympathized with abortionists for sociological and political reasons. He even reminded us that if abortion is not readily available, we will return to the era of the illegal abortions and even self abortions. These are wives' tales regularly practiced by abortionists, which Thompson apparently believes.

He reasoned that local doctors do not want to be abortionists because of (1) religious or moral convictions, (2) the stigma or professional consequences of being an abortionist, and (3) the lingering threat of violence, "particularly in Alabama." The latter is a red herring, though the first two are legitimate reasons why local physicians do not engage in what is a highly debatable and questionable health service. These are not reasons to penalize the state for trying to protect women from those persons who do not have these concerns, but come into the state to perform their mercenary services. The evidence was clear that hospitals credential physicians based on responsibility and liability. Abortionists, who usually have no malpractice insurance, are not concerned with these niceties. Judge Thompson focused on abortion as a safe procedure, but failed to recognize the cycle of substandard doctors who have worked in Alabama abortion clinics. He opined no one wanted to operate abortion clinics in Alabama because of these reasons. That is not correct – they simply do not want to observe a proper patient/physician relationship.

There will need to be an opinion from the 11th Circuit Court of Appeals reversing this ruling on an expected appeal by Attorney General Luther Strange. This will permit abortionists during the interim to operate in Alabama without meeting this proper standard of healthcare. It may be sometime, however, before there can be an appeal. Thompson did not specify the remedy, i.e., while he held the law unconstitutional, he did not say what he would do with it. Presumably, he will issue a permanent injunction. One of the problems he has is technical. The law never went into effect. Therefore, the challenge of unconstitutionality is called a "facial" challenge. This means that it would not apply in any circumstance. The problem with Thompson's ruling is that he collected evidence as if it were an "as applied" challenge. This type challenge means the law has been in effect and you can collect evidence of how it operates unconstitutionally. This creates somewhat of a legal conundrum for him and for lawyers on both sides of the case. Like the Justices in *Roe v. Wade*, Judge Thompson knew he wanted to rule this law unconstitutional when he first saw it, but he had to figure out how. He is still in the process.

There are several conflicting federal court decisions on similar laws in other states. These cases will provide an excellent opportunity for the U.S. Supreme Court to revisit the abortion issue. With the present makeup of the U.S. Supreme Court, whatever opinion will be written will be a five-four decision, with Justice Kennedy being the swing vote. Kennedy wrote the *Casey* decision and we would be hopeful he would take offense at using his "undue burden" reasoning to diminish women's healthcare.