

SOUTHEAST LAW INSTITUTE™

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Dear Friends and Supporters,

We hope your new year has gotten started off on the right foot. We at SLI always try to start off on the right foot, though sometimes we may inadvertently begin on the left foot. More particularly, we are grateful to SLI supporters Eunie Smith and Donald McCants for pointing out to us the quote in our January update attributed to Alexis de Tocqueville was actually made by Edmund Burke - "All that is required for evil to triumph is for good men to do nothing." We are always grateful for any assistance we can get and encourage our supporters to communicate with us.

We have certainly been busy with a number of things. The first and foremost, our update this month is a report on the Woman's Right to Know Act. It was thirteen years in the legislative making and about one and one-half years in the judicial refinement. We are glad to report the bill came out virtually intact from the judicial process. Women in Alabama may now expect to get sufficient information upon which to make an informed judgment about whether to obtain an abortion. Statistics from states that have similar laws demonstrate a significant reduction in the number of abortions.

I represented Attorney General Bill Pryor in the Woman's Right to Know litigation (the Attorney General is always a defendant when the constitutionality of a law is challenged), as well as, drafting the bill and shepherding it through the legislative process. I have received no pay for any of this. SLI has received no money for this case. It has taken a great deal of time and expense. We are requesting special designated financial gifts for these efforts. Please demonstrate your support of this milestone by making a special contribution to SLI.

We have also been busy drafting or reviewing legislation. We will give a more detailed report when we move further into the legislative session which begins February 3, 2004. Included in those bills are ones requiring the Ten Commandments and other historical documents be posted in public schools; requiring doctors who do abortions to have admitting privileges to local hospitals; giving teachers the right without fear of retribution to teach alternative theories and points of view on academic subjects; and approving an Alabama constitutional amendment to prohibit same sex marriage and civil unions.

Finally, we wish to express our sincere thanks for the financial support you gave us during 2003. We ended the year with generous contributions. We hope this is an indication that what we are doing and saying is hitting the mark. In addition to saying the right thing, whether it is a quote or on an issue, as former Circuit Judge William Barber used to say, we always want to do the "righteous thing". Please continue your expressions of support by your contributions, prayers, and comments. Until we meet here again, I am,

Sincerely,

A. Eric Johnston
General Counsel

AEJ/mc

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

To: SLI Supporters
Date: February 2004
From: A. Eric Johnston
Re: Federal Court Upholds the Constitutionality of the Woman's Right To Know Act

In February 1990 a bill was filed in the Alabama legislature that would have required abortion providers to give women seeking abortions a minimum of medical information upon which they could make informed decisions. For most of the years that followed the bill was reintroduced with changes according to the latest decisions of the U.S. Supreme Court. Finally, on April 17, 2002, the Woman's Right To Know Act ("Act") was signed into law and was scheduled to go into effect on October 14, 2002. In September 2002, attorneys for the Center for Reproductive Law & Policy on behalf of Alabama abortion providers filed a lawsuit contesting the constitutionality of the Act. The final orders of the federal court are now being entered, thereby completing the litigation. By April 7, 2004, the Act should be fully implemented.

THE LAW AND THE LAWSUIT

The Act requires abortion providers to give certain information to any woman who is considering an abortion. The information is in the form of written material prepared by the state, which must be given at least twenty-four hours before an abortion is to be performed. The information is given through a color booklet which contains pictures of the unborn child at two week intervals, medical facts and practical information. Some of this same material is included in a video tape which may be viewed by the woman. The information must be given again but orally by the abortion doctor before the abortion is performed. An ultrasound of the unborn child is to be performed and the woman may view it. The purpose of the Act is to provide a higher standard of healthcare for these women, while protecting the unborn child. By providing accurate medical information, a woman who is considering abortion can make an informed decision. The abortion industry has not lived up to the standard of care which you normally expect from your own healthcare providers. Consequently, the legislature enacted this law.

The abortion providers attack on the Act was very broad based. Their initial complaint filed in federal court challenged every aspect of the Act and sought to throw out the booklet and video ("materials") altogether and nullify any requirement that the Act be followed. As you will see from the following paragraphs, the abortion providers achieved only a very limited success.

THE JUDGMENTS OF THE COURT AND THE SETTLEMENT AGREEMENTS

The Act is a very complicated and extensive statute. It has many provisions. While the plaintiffs initially argued the entire act was unconstitutional and therefore should be thrown out, the judicial process became one of piecemeal review of the numerous provisions of the Act. As a result, the final determination consisted of two multi-part agreements by the parties, and the contested issues were submitted to the court resulting in three judgments. The following paragraphs give a summary review of these judgments and agreements.

Judgment of July 25, 2003

The Act required abortion providers to pay for the booklet. The court held in a contested hearing this requirement violated free speech rights. While the state may declare its preference for child birth, it cannot make someone pay for the preference. The state can require distribution of the materials and that the materials be given to the woman, but cannot charge for them.

Judgment of December 29, 2003

Following a contested hearing, the court held the state may not require the materials be given to a woman who is carrying a child with lethal anomalies. Since the child would not be expected to live, no purpose would be served by the state requiring information on child support, father's responsibility, and other information being given. The state argued the injunction on this issue was too broad and that useful information on fetal development, contraception and other information should be given. The court did not agree.

Stipulation and Partial Settlement Agreement

Declaratory Judgment and Permanent Injunction

The medical emergency exception to any abortion law is the key to its regulatory effect. A too broad medical emergency exception makes such a law worthless. Such an exception is considered a loophole if it has a broad psychological exception. The Act's medical emergency exception required it must be only for a "substantial and irreversible impairment of a major bodily function". The arguments surrounding this issue were some of the main issues in the case. Finally, through related court orders and stipulations of the parties, the medical emergency exception also includes not giving the materials if it "would cause a woman severe non-temporary psychological harm".

The parties were able to agree on several other issues: (1) an ectopic pregnancy shall be considered a medical emergency, thereby relieving the abortion doctor from providing certain required information to the woman; (2) if the child is not viable, information required by the Act relating to pre-viability issues is not required to be given, but the results of the ultrasound test should be determinative; (3) if a woman withdraws her previously given abortion consent, the appropriate referral requirement in the Act means that referral would be made to a qualified physician or to a public or private agency who provides such services, and the state published book listing those agencies would satisfy the requirement.

The last ruling from the court, Declaratory Judgment and Permanent Injunction, incorporates the agreements of the Parties contained in the Stipulation and Partial Settlement Agreement. The court enters those agreements as declaratory findings, then enjoins the state from taking any inconsistent actions.

Partial Settlement Agreement on Materials

This agreement relates to the booklet and the video required under the Act . The booklet is required to be given to women, unless one of the exceptions exist and the video must be made available for her to view if she wishes. There were several typographical errors in the booklet, such as a referral at one place to "thick red skin" when it should have been "thin red skin". These were corrected. The booklet was reworded in some places to emphasize that "risk factors, depend on the individual and the abortion doctor must assess these risks and explain them". Some medical complexities were clarified, *i.e.*, if a medical abortion (by drugs) is not successful, a surgical abortion would be required. The "breast cancer link" was removed because the National Institutes of Health could not take a definitive position. These changes will be made in the booklet and video within ninety days of the filing of the agreement, *i.e.*, by April 7, 2004.

DISCUSSION

The state was primarily disappointed in the removal of the breast cancer link information from the materials. However, the ongoing debate at the National Institutes of Health left the state with no reasonable argument that would persuade the court to leave the information in the booklet. Once the breast cancer link national debate is resolved, the booklet may be amended to include this information.

The medical emergency exception for psychological problems which resulted from the lawsuit is not ideal, but under current jurisprudence, it is the best that could be expected. Any exception that is noted in the medical record must be valid, specific, and identify a serious condition. If there is abuse of this, criminal prosecutions should follow.

In all events, the state reserves the right to change and update the booklet as necessary. At the same time, these changes could be challenged. Medical science constantly progresses and changes in the future are expected. Valid amendments to the booklet are not likely to be challenged.

The state was also disappointed that the cost of the booklet could not be passed on to the abortion providers. However, the relative nominal cost of producing the booklet compared to the significant benefit it gives women leaves little question that the greater value is in its informed consent. The materials are of a very high quality. The booklet is exceptional in its presentation of the information and the color pictures and drawings. Any woman who reviews the medical reality portrayed by the booklet will have no alternative but to see the humanity of the unborn child.

CONCLUSION

A debt of gratitude is due to Attorney General Bill Pryor for committing the necessary resources to uphold this Act. The lawyer primarily responsible for the litigation in the Attorney General's office was Assistant Attorney General Charles Campbell. Mr. Campbell did an outstanding job protecting the provisions of the Act. I served as Deputy Attorney General and was privileged to work with Messers Pryor

and Campbell. Additional support and participation was given by health department lawyers and personnel, including Pat Ivie, Rick Harris, John Wible and State Health Officer Dr. Don Williamson.

The struggle was long and difficult, both legislatively and judicially. SLI is fortunate to have been involved in both processes. The result is a very good strong law that will improve health care to women considering abortion and, most importantly, will result in saving the lives of many unborn children. The foregoing is a brief explanation. For those of you who want additional information, please contact us and we will be glad to provide it.