COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

August 20, 2010

The Honorable Ralph K. Smith
Member, Senate of Virginia
Post Office Box 91
Roanoke, Virginia 24002

Dear Senator Smith:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia.*

Issue Presented

You ask whether the Commonwealth can regulate facilities in which first trimester abortion services are provided and medical personnel who perform first trimester abortions.

Response

It is my opinion that the Commonwealth has the authority to promulgate regulations for facilities in which first trimester abortions are performed as well as for providers of first trimester abortions, so long as the regulations adhere to constitutional limitations.

Applicable Law and Discussion

To promote "the protection, improvement and preservation of the public health,"[1] the General Assembly has enacted Title 32.1 of the Code of Virginia, which provides in pertinent part for the regulation of medical and health care facilities.[2] In addition, because "the unregulated practice of the profession or occupation can harm or endanger the health, safety, or welfare of the public,"[3] the Commonwealth further exercises its police power to oversee health professionals "for the exclusive purpose of protecting the public interest."[4]

Virginia law provides that all hospitals in the Commonwealth are to be licensed[5] and directs the State Health Commissioner to issue licenses in accordance with the regulations of the Board and other

---

[1] VA. CODE ANN. § 32.1-2 (2009).

[2] *See Code of Virginia*, Title 32.1, Chapter 5 "Regulation of Medical Care Facilities and Services," §§ 32.1-123 through 32.1-162.15 (2009 & Supp. 2010).

[3] VA. CODE ANN. § 54.1-100 (2009).

[4] *Id.*

[5] Section 32.1-125 (2009).

law. The Code broadly defines "hospital" as "any facility . . . in which the primary function is the provision of diagnosis, treatment, and of medical and nursing services, surgical or nonsurgical, for two or more nonrelated individuals, including . . . outpatient surgical [hospitals]."[6] Although "abortion clinics" are not specifically mentioned, this definition encompasses facilities in which abortions are performed.[7] Indeed, pursuant to its authority to classify hospitals,[8] the Board of Health has deemed "outpatient abortion clinics" to be outpatient hospitals.[9]

For all hospitals, Virginia law requires minimum standards for their construction, maintenance, operation, staffing and equipping of hospitals.[10] Institutions licensed as outpatient surgical hospitals, including those providing abortion services, are subject to the specific provisions of Part IV of the Board's *Regulations for the Licensure of Hospitals in Virginia.*[11] Licensure requirements include disclosure of ownership,[12] inclusion of certain provisions in policy and procedure manuals,[13] requisites for medical and nursing staffing,[14] ensuring availability of sterile supplies,[15] maintenance of accurate medical records,[16] and provision of emergency plans and services,[17] among others. In addition to these conditions, such facilities in which abortions are performed must also furnish records of abortion to the Division of Vital Records within ten days,[18] ensure the diagnosis of pregnancy is made by the physician performing the abortion,[19] and offer each patient counseling and instruction in the abortion procedure and birth control methods.[20]

Medical facilities that provide abortion services in addition to many other services across a variety of disciplines clearly are subject to regulation by the Board. I note, however, that although the Board classifies "abortion clinics" as outpatient hospitals, neither the Regulations nor the Code define the term. Moreover, unlike later abortions, first-trimester abortions are not required to be performed in licensed hospitals.[21] Health centers limiting their practice to specializing in reproductive services therefore often characterize themselves as "physicians' offices," whereby they are exempted from the

---

[6] Section 32.1-123 (2009).

[7] The description of the primary function of a hospital encompasses the abortion process. *See* 2007 Op. Va. Att'y Gen. 53.

[8] Section 32.1-127(B)(3) (2009).

[9] 12 VA. ADMIN. CODE § 5-410-10 (2010).

[10] Sections 32.1-127(B); 32.1-127.001 (2009).

[11] 12 VA. ADMIN. CODE § 5-410-1150 to 1380, "Part IV, Outpatient Surgical Hospitals: Organization. Operation, and Design Standards for Existing and New Facilities" (2010).

[12] *Id.* § 1150

[13] *Id.* § 1170

[14] *Id.* §§ 1180, 1190.

[15] *Id.* § 1210.

[16] *Id.* § 1260.

[17] *Id.* §§ 1230; 1240.

[18] *Id.* § 1260(C)(3)

[19] *Id.* § 1270(D).

[20] *Id.* § 1270(E)

[21] *Compare* VA. CODE ANN. § 18.2-72 *with* §§ 18.2-73; 18.2-74 (2009).

Board's licensure requirements.[22] Nonetheless, the Board has broad authority to adopt regulations as may be necessary to carry out the provisions of Title 32.1,[23] and this regulatory authority includes defining an "abortion clinic," investigating the assertion by a facility that it constitutes physician's office,[24] and regulating facilities beyond licensure.

Irrespective of the Board of Health's ability to regulate facilities, the Board of Medicine ("BOM") is vested with authority to regulate the practice of medicine,[25] which includes providing guidelines for certain procedures and the ability to license, investigate, and discipline physicians, including those who perform abortions.[26] The BOM's *Regulations Governing the Practice of Medicine, Osteopathic Medicine, Podiatry and Chiropractic* sets forth, for example, requirements for the proper administration of general anesthesia in non-hospital settings,[27] a procedure that may be necessary depending on the abortion method employed. In addition, these regulations provide confidentiality, record keeping and advertising rules and prescribe educational and examination requirements for licensure.

Moreover, the BOM may deny, suspend or revoke a license based on "unprofessional conduct,"[28] which includes the "intentional or negligent conduct in the practice of any branch of the healing arts that causes or is likely to cause injury to a patient;"[29] conducting a practice in a manner dangerous to patients or the public;[30] and violating any statute or regulation relating to the distribution, dispensing, or

---

[22] Section 32.1-124 provides that the provisions relating to hospital licensure and inspection do not apply to "an office of one or more physicians or surgeons unless such office is used principally for performing surgery." "Surgery" is defined neither by the Code nor by the Regulations.

[23] Section 32.1-12.

[24] *See* §§ 32.1-12; 32.1-127 (2009). The Department of Health does not currently investigate a facility's status as a physician's office or whether the office principally performs surgery, but the Commissioner of Health or his designee may enter onto any property to inspect or investigate to determine compliance with any law or regulation. Section 32.1-25 (2009). Upon discovering that a facility meets the definition of a hospital rather than a physician's office, the Commissioner can petition an appropriate circuit court for an injunction to either compel licensure or the cessation of operations. Section 32.1-27 (2009).

[25] Section 54.1-2900 (2009) defines "practice of medicine" as "the prevention, diagnosis and treatment of human physical or mental ailments, conditions, diseases, pain or infirmities by any means or method." Clearly, performing an abortion procedure constitutes engaging in the practice of medicine.

[26] *See* §§ 54.1-2400; 54.1-2503; 54.1-2929 (2009). Virginia law requires that abortions be performed by a "physician licensed by the Board of Medicine to practice medicine and surgery[.]" Section 18.2-72 through 74. Even if the abortion procedure used is delegable under § 54.1-2901(A) or § 54.1-2952 to nurses or physicians assistants, those personnel are subject to their own regulations and licensing requirements (*See* §§ 54.1-3000 through 54.1-3043; 18 VA. ADMIN. CODE § 90-11 to 90-40; §§ 54.1-2949 through 54.1-2953; 18 VA. ADMIN. CODE § 50-10-184) and must be supervised by a licensed physician (*See* 18 VA. ADMIN. CODE § 85-20-29; VA. CODE ANN. §§ 54.1-2901; 54.1-2952). Moreover, persons prescribing or dispensing pharmaceuticals are subject to regulation. *See* §§ 32.1-126.02; 54.1-2519 through 54.1-2526; 54.1-2952.1; 54.1-2957.01; 54.1-3300 through 54.1-3322; 54.1-3400 through 54.1-3472; 18 VA. ADMIN. CODE §§ 110-20-11 through 110-20-730; 110-30-10 through 110-30-270 (2010).

[27] *See* 18 VA. ADMIN. CODE §§ 20-310 to 390; VA. CODE ANN. §§ 54.1-2901; 54.1-2912.1 (2009).

[28] Section 54.1-2915(A) (2009).

[29] Section 54.1-2915(A)(3).

[30] Section 54.1-2915(A)(13).

administration of drugs.[31] Notably, "[u]ndertaking in any manner or by any means whatsoever to procure or perform or aid or abet in procuring or performing a criminal abortion" also constitutes unprofessional conduct.[32] These standards were enforced as recently as 2007, when the Court of Appeals of Virginia upheld the Board of Medicine's suspension of the medical license of a physician who failed to use the proper standard of care in diagnosing the gestational age of a fetus for the purpose of performing an abortion.[33]

In addition to applying regulations governing medical facilities and health care providers in general, the relevant agencies are authorized to impose regulations particular to abortion services. The General Assembly has afforded certain agencies broad authority to regulate in the area of health and has permitted them to classify facilities, procedures and personnel as they deem necessary and to promulgate regulations accordingly. Regulations would be appropriate when medical procedures carry certain risks. The potential complications of abortion procedures include hemorrhage, cervical laceration, uterine perforation, injury to the bowels or bladder and pulmonary complications.[34] Furthermore, these complications "must be immediately and adequately treated."[35] Regulatory boards may distinguish between abortion and other procedures because, "'abortion is inherently different from other medical procedures,'"[36] and "for the purpose of regulation, abortion services are rationally distinct from other routine medical services if for no other reason than the particular gravitas of the moral, psychological, and familial aspects of the abortion decision."[37]

Based on Virginia's police power to protect its citizen's health and welfare, the broad authority granted to the regulatory boards, and the extensive statutory and regulatory scheme currently applicable to physicians performing abortions and the facilities in which such services are available, I conclude that the Commonwealth, by the Virginia Board of Health, the Virginia Board of Medicine, or any other proper agency, has the authority to continue to promulgate regulations affecting the performance of first trimester abortions.

Virginia previously exercised this authority, when on November 12, 1981, the Virginia Board of Health ("Board") adopted "Rules and Regulations for the Licensure of Outpatient Hospitals, Part V, Outpatient Hospitals Performing Abortions Only."[38] Those regulations subsequently were withdrawn in

---

[31] Section 54.1-2915(A)(17).

[32] Section 54.1-2915(A)(6).

[33] Abofreka v. Virginia Board of Medicine, No. 2793-06-4, 2007 Va. App. LEXIS 304 (Va. Ct. App. Aug. 14, 2007).

[34] ERIC R. STRASBURG, *Abortion, in* MANUAL OF CLINICAL PROBLEMS IN OBSTETRICS AND GYNECOLOGY 6 (Michael E. Rivlin, Rick W. Martin eds. 4th ed. 1994). *See also* PHILLIP G. STUBBLEFIELD, *Complications of Induced Abortion, in* EMERGENCY CARE OF THE WOMAN 37-47 (Mark D. Pearlman, Judith E. Tintinalli eds., 1998) (detailing possible complications of abortion procedures).

[35] STRASBURG, *Abortion*, at 6.

[36] Greenville Women's Clinic v. Bryant, 222 F.3d 157, 174 (4th Cir. 2000), *cert. denied* 531 U.S. 1191 (2001), (citing Harris v. McCrae, 448 U.S. 297, 325 (1980)).

[37] *Id.* at 173.

[38] The regulations became effective on May 1, 1982. The regulations included, among other requirements, disclosure of ownership, limits on abortions performed in the clinics to those occurring in the first trimester, presence of a Medical Director and appropriate nursing and counseling staff, and detailed clinical area design. Rules and Regulations for the Licensure of Outpatient Hospitals, Part V, Outpatient Hospitals Performing Abortions Only,

1984, but not based upon a lack of authority. Instead, the repeal was based upon the view that such regulations collided with precedent from the United States Supreme Court.[39] More recent precedent from the United States Court of Appeals for the Fourth Circuit provides clear guidance with respect to what constitutes permissible regulation and what does not.

The State's authority to regulate abortion is limited by the United States Supreme Court's evolving jurisprudence. Beginning in 1973 with *Roe v. Wade*, the Court announced a right for a woman to end a pregnancy through an abortion.[40] While acknowledging that the Constitution does not contain an express guarantee of privacy, the Court reasoned that the Constitution does recognize "a right of personal privacy, or a guarantee of certain areas or zones of privacy."[41] This right, the Court explained, derives from specific constitutional amendments, "the concept of liberty guaranteed by the first section of the Fourteenth Amendment," and the "penumbras of the Bill of Rights."[42] Ultimately, the Court concluded in *Roe v. Wade* that "[t]his right of privacy" – whatever its origin – "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[43] Over time, the Court has reaffirmed the "essential holding" of *Roe* – that a woman has a constitutional right to "have an abortion before viability and to obtain it without undue interference from the State."[44] This right, however, is framed by the State's "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus."[45]

The Supreme Court has sustained a state statute requiring all abortions, including first trimester abortions, to be performed by physicians only.[46] The Court reasoned that such a regulation did not impose a substantial obstacle to obtaining an abortion.[47] The Court further noted that "the constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals."[48]

In this circuit, the parameters within which states may constitutionally regulate first trimester abortion services were articulated by the United States Court of Appeals for the Fourth Circuit in *Greenville Women's Clinic v. Bryant*.[49] The Court upheld South Carolina legislation and regulations that,

---

Organization, Operation and Design Standards for Existing and New Facilities §§ 900.2, 902.1.2, 903.1.1, 903.2, 903.3, 905.5.2.

[39] Regulatory Review Summary, Repeal of Part V, 17 September 1984. This view was repeated in a letter by Governor Charles S. Robb. "[T]he Board and the Department," the Governor wrote, "cannot enforce laws and regulations that have been determined to be invalid by United States Supreme Court decisions. We have checked this point with the Attorney General's office and have been told that indeed such laws and regulations cannot be enforced by the Department." Charles S. Robb, Governor to The Most Reverend Walter F. Sullivan, 15 October 1984.

[40] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153-56 (1973). *See also* Thornburgh v. Am. Coll. Obstetricians & Gynecologists, 476 U.S. 747 (1986); Planned Parenthood v. Casey, 505 U.S. 833 (1992); Stenberg v. Carhart, 530 U.S. 914 (2000); Gonzales v. Carhart, 550 U.S. 124 (2007).

[41] *Roe,* 410 U.S at 152.

[42] *Id.*

[43] *Id.* at 153.

[44] *Greenville Women's Clinic*, 222 F.3d at 166 (quoting *Casey*, 505 U.S. at 846 (plurality opinion)).

[45] *Id.*

[46] Mazurek v. Armstrong, 520 U.S. 968, 974-75 (1997) (*per curiam*) (overturning preliminary injunction).

[47] *Id.* at 972.

[48] *Id.* at 973 (quoting *Casey*, 505 U.S. at 885).

[49] *Greenville Women's Clinic*, 222 F.3d at 174.

in essence, extended the rules already imposed on facilities offering second trimester abortions to establishments in which five or more first trimester abortions were performed. The regulations at issue concerned licensing requirements; staffing rules; specified drug, equipment and laboratory availability; detailed record keeping and reporting duties; maintenance, safety and emergency policies; sterilization procedures; and design and construction standards.[50] Recognizing that the state has a valid interest "'from the outset of the pregnancy in protecting the health of the woman and the life of the fetus,'"[51] the Court found that "there is no requirement that a state refrain from regulating abortion facilities until a public-health problem manifests itself."[52]

"To the extent that state regulations interfere with the woman's status as the ultimate decisionmaker, or try to give the decision to someone other than the woman, the Court has invalidated them."[53] State regulations that serve "a valid purpose" and do not "strike at the [abortion] right itself" are valid regulations.[54] In rendering its decision, the Court considered the costs associated with compliance,[55] and despite finding that the regulations likely would increase costs to women seeking abortion, the Court determined that because the impact was not prohibitive, the increased financial imposition did not constitute an undue burden on a woman's ability to decide whether to terminate her pregnancy.[56] It is "[o]nly when the increased cost of abortion is prohibitive, essentially depriving women of the choice to have an abortion, has the Court invalidated regulations because they impose financial burdens."[57]

Ultimately, the Fourth Circuit concluded that the South Carolina regulations, addressing medical and safety aspects of providing abortions, as well as the recordkeeping and administrative practices of abortion clinics, and which applied to all abortions including abortions performed during the first trimester, were valid. These regulations permitted the abortion practice to continue without significant interference while assuring a "dignified and safe procedure."[58] In sum, I conclude that the Commonwealth has similar authority to regulate facilities in which first trimester abortions are provided and those persons performing them, so long as the regulations adhere to these constitutional considerations.

Conclusion

Accordingly, it is my opinion that the Commonwealth has the authority to promulgate regulations for facilities in which first trimester abortions are performed as well as providers of first trimester abortions, so long as the regulations adhere to constitutional limitations.

---

[50] *Id.* at 160-162.

[51] *Id.* at 165, 166 (citing *Casey*, 505 U.S. at 846).

[52] *Id.* at 169.

[53] *Id.* at 166.

[54] *Id.* (citing *Casey*, 505 U.S. at 878). The Fourth Circuit noted that if a regulation serves a valid purpose, such as furthering the health or safety of a woman seeking an abortion, and not designed to strike at the right itself, the fact that it also has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.

[55] *Id.* at 170-72.

[56] *Id.* (citing *Casey,* 505 U.S. at 874, 875, 878).

[57] *Id.* (citing Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416, 434-39 (1983)).

[58] *Id.* at 175.

With warmest regards, I am

Very truly yours,

Kenneth T. Cuccinelli, II
Attorney General