

March 14, 2005

Rep. Duncan Frey Kilmartin
State House
Montpelier, VT 05633

Re: Applicability of 13 V.S.A. § 101 to abortions performed
by persons other than licensed physicians

Dear Representative Kilmartin:

You have asked for an opinion regarding the application of 13 V.S.A. § 101 to abortions performed by persons other than licensed physicians and specifically asked for responses to certain hypothetical situations involving a variety of medical practitioners. Upon review of the issue, I conclude that section 101 does not apply to abortions performed by licensed physicians and osteopaths. Nor does it apply to abortions performed by physician's assistants or advanced practice nurses, if the procedure falls within the practitioner's approved scope of practice. I address your questions in more detail below by examining the interaction of section 101 with Vermont's regulation of health care providers.

To begin with, section 101, which regulates abortion, must be construed in light of federal and state constitutional requirements. The statute, originally enacted in the nineteenth century, imposes criminal penalties on a person "who willfully administers, advises or causes to be administered anything to a woman pregnant, or employs or causes to be employed any means with intent to procure the miscarriage of such woman, or assists or counsels therein, unless the same is necessary to preserve her life." As you note in your letter, the Vermont Supreme Court in 1972 held that this statute could not be applied to abortions performed by "medical practitioners," because to do so would deny a woman medical aid except

where necessary to preserve her life. *Beecham v. Leahy*, 130 Vt. 164, 170-71 (1972). Shortly after the *Beecham* decision, the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 163-64 (1973), held that States could not prohibit abortions before viability. In *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992), the Supreme Court reaffirmed *Roe*'s "essential holding," including "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." These decisions significantly narrowed the scope of section 101.

These decisions do not leave section 101 a nullity, however. The Vermont Supreme Court acknowledged in *Beecham* that the statute is "valid and necessary" insofar as it "prevents unskilled and untrained persons from acting in an area properly medical." No reported decisions after *Beecham* provide guidance on the application of section 101 to abortions performed by "unskilled and untrained persons." However, the high courts of other states with similar statutes have upheld the prosecution of laypersons who perform abortions. *See State v. Norflett*, 337 A.2d 609 (N.J. 1975) (holding, post-*Roe*, that abortion statute authorizes criminal prosecution of laymen for performing abortion and affirming conviction of defendant with no medical training); *People v. Bricker*, 208 N.W.2d 72 (Mich. 1973) (construing state statute in light of *Roe* and affirming conviction of nonphysician for conspiracy to commit abortion). The United States Supreme Court has held that the federal constitution does not prohibit such prosecutions. *Connecticut v. Menillo*, 423 U.S. 9 (1975).

The key issue under section 101 is the distinction between an untrained and/or unlicensed "layperson" and a person who may lawfully perform an abortion as part of the person's practice of medicine. In your letter, you suggest "only physicians are authorized to perform the surgical procedure of abortion." However, this view appears to be neither the practice in Vermont nor the view of the Boards that supervise the practice of medicine and nursing in the State. As described in more detail below, both physician's assistants and advanced practice nurses may, in the appropriate circumstances, perform abortions.

Before proceeding, I should point out that there are different types of abortion procedures (including nonsurgical abortion) and the difficulty of a particular procedure may vary depending on the duration of the pregnancy and other factors. An individual medical practitioner may be qualified to perform some types of abortions but not others.

Some additional information about physician's assistants and advanced practice nurses (often referred to as midlevel practitioners) may also be helpful to this discussion. A physician's assistant is an "individual certified by the state of Vermont who is qualified by education, training, experience and personal character to provide medical services under the direction and supervision of a Vermont

licensed physician.” 26 V.S.A. § 1732(4). The Board of Medical Practice regulates physician’s assistants, who are “considered the agents of their supervising physicians in the performance of all practice-related activities.” Rules of the Board of Medical Practice § 5.1. The practice of a physician’s assistant is defined by a written protocol or “scope of practice” which details “those areas of medical practice, including duties and medical acts, delegated to a physician assistant by the supervising physician.” *Id.* §§5.2(k), 7.3; *see also* 26 V.S.A. § 1732(6). A physician’s assistant may perform only those tasks that are within the supervising physician’s field of practice and for which the physician’s assistant is qualified by education, training, and experience. 26 V.S.A. § 1736(b). Thus, if a physician’s assistant (1) works under the supervision of a doctor who performs abortions, and (2) is qualified by training and experience to perform abortions, he or she may lawfully do so, assuming the supervising physician has identified and approved that task in a written scope of practice filed with the Medical Board.

Advanced practice nurses also perform abortions in the state of Vermont. An advanced practice nurse “means a licensed registered nurse authorized to practice in this state who, because of specialized education and experience is endorsed to perform acts of medical diagnosis and to prescribe medical, therapeutic or corrective measures under administrative rules adopted by the [Board of Nursing].” 26 V.S.A. § 1572(4). The term “advanced practice registered nurse” [APRN] includes several categories of practitioners, such as certified nurse midwives, adult nurse practitioners, and woman’s health care nurse practitioners. State Board of Nursing Administrative Rules ch. 4, Rule VIII (a). Under the Board’s rules, an advanced practice registered nurse “performs medical acts independently within a collaborative practice with a licensed physician under practice guidelines which are mutually agreed upon between the APRN and collaborating physician and which are jointly acceptable to the medical and nursing professions.” *Id.* Rule VIII(C)(4)(a). APRNs provide care under individual practice guidelines approved by the Board of Nursing. Those guidelines “must reflect current standards of medical and nursing practice.” *Id.* Rule VIII(C)(4)(a), (g). The practice guidelines must also be reviewed, mutually agreed upon, and signed annually by the APRN and the collaborating physician. *Id.* Rule VIII(C)(4)(f). Depending on their education and training, some APRNs may perform abortions under broad practice guidelines approved by the Board.

To respond directly to the hypotheticals posited in your letter, section 101 would not apply to a physician’s assistant or an advanced practice nurse who performs abortions if the procedure falls within the practitioner’s approved scope of practice. The other medical professions you identify – registered nurse, nursing assistant, licensed practical nurse, x-ray technician (radiologist), dentist, attorney – are not authorized by training, education or experience to perform abortions. Except in an emergency situation, *see, e.g.*, 26 V.S.A. § 1583(1), persons other than licensed physicians, osteopaths, physician’s assistants, and advanced practice

nurses may not lawfully perform abortions. As with any medical procedure, however, other persons, such as nurses and technicians, may assist an authorized practitioner during an abortion procedure.

Your letter raises several other issues, which I address in turn below.

Consideration or payment for an abortion. Payment is irrelevant under section 101. The statute neither prevents medical professionals from charging a fee for their services nor allows laypersons to perform abortions even if they do not charge for the procedure.

Performance of an abortion in a private home. The proper location for provision of medical services – an office, clinic, hospital, or private home – appears to be a matter entrusted to the judgment of medical professionals.

The involvement of a licensed physician. A physician's assistant or advanced practice nurse who is authorized to perform abortions may do so outside the physical presence of the supervising or collaborating physician. If a person were not authorized to perform abortions, the fact that the person is employed by or has received some training from a physician would not be sufficient to permit the person lawfully to perform abortions.

The operation of a clinic (Scenario 15). You inquire whether a clinic may employ a nurse or nurse practitioner to perform abortions if the clinic does not also employ a physician. An advanced practice nurse authorized to perform abortions may lawfully do so regardless of whether the clinic employs a physician. As described above, the advanced practice nurse must practice in a collaborative relationship with a physician. No state law requires a specific employment relationship, however.

You also inquire about potential criminal liability for clinic staff, such as a receptionist and scheduler. If the practitioner is lawfully performing abortions, there is of course no criminal liability for any other employee of the clinic. Persons who assist in procuring or performing illegal abortions could in some circumstances face criminal liability, but their culpability would depend on their knowledge and intent.

Other criminal statutes. A person who performs an illegal abortion might face prosecution for other criminal offenses, such as illegal practice of medicine, assault, or reckless endangerment. The charges that could be brought in a particular case would depend upon the specific circumstances, including specific acts, any injuries caused, and any representations made by the person who performs the illegal abortion.

I trust this letter is responsive to your inquiry.

Sincerely,

Bridget C. Asay
Assistant Attorney General

APPROVED: _____
William H. Sorrell
Attorney General