Janet Napolitano
Attorney General
Firm State Bar No. 14000

Kevin D. Ray (007485)
Lynne C. Adams (011367)
Timothy C. Miller (016664)
Assistant Attorneys General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-1610

Attorneys for defendants Catherine Eden and Janet Napolitano

Nikolas T. Nikas (011025)
Denise M. Burke (admitted pro hac vice)
Stephen M. Crampton (admitted pro hac vice)
Brian Fahling (admitted pro hac vice)
Special Deputy Maricopa County Attorneys
c/o 16465 Henderson Pass, #1132
San Antonio, Texas 78232
(210) 494-7781

Attorneys for defendant Richard M. Romley

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Tucson Woman's Clinic, et. al.,

Plaintiffs,

v.

Catherine Eden, in her capacity as Director of the Arizona Department of Health Services, et. al.,

Defendants.

No. CIV 00-141 TUC RCC

THE DEFENDANTS' JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' VAGUENESS CLAIM

(Oral Argument Requested)

Pursuant to Fed. R. Civ. P. 56, the defendants move this court for partial summary judgment, dismissing with prejudice Count V of plaintiffs' Fourth Amended Complaint, which is based on a violation of due process on the grounds of vagueness. This motion is supported by the accompanying memorandum in support and separate statement of facts relied upon pursuant to D. Ariz. R. 1.10(*l*)(1).

April 30, 2001.

Janet Napolitano
Attorney General

By Lynne C. Adams
Kevin D. Ray
Lynne C. Adams
Timothy C. Miller
Assistant Attorneys General
1275 W. Washington Street
Phoenix, Arizona 85007
(602) 542-1610

Richard M. Romley
Maricopa County Attorney

By Denise M Burke
Nikolas T. Nikas
Denise M. Burke
Stephen M. Crampton
Brian Fahling
Special Deputy Maricopa County Attorneys
c/o 16465 Henderson Pass, #1132
San Antonio, Texas 78232
(210) 494-7781

Copy mailed on April 30, 2001 to:

Ms. Bonnie Scott Jones
Ms. Julie Rikelman
THE CENTER FOR REPRODUCTIVE LAW & POLICY
120 Wall Street, 14th Floor
New York City, New York 10005
Attorneys for Plaintiffs

Edna Martin

Janet Napolitano
Attorney General
Firm State Bar No. 14000

Kevin D. Ray (007485)
Lynne C. Adams (011367)
Timothy C. Miller (016664)
Assistant Attorneys General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-1610

Attorneys for defendants Catherine Eden and Janet Napolitano

Nikolas T. Nikas (011025)
Denise M. Burke (admitted pro hac vice)
Stephen M. Crampton (admitted pro hac vice)
Brian Fahling (admitted pro hac vice)
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c/o 16465 Henderson Pass, #1132
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MEMORANDUM IN SUPPORT OF THE DEFENDANTS' JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' VAGUENESS CLAIM

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A.A.C.	The Arizona Administrative Code.
DHS	The Arizona Department of Health Services, the state agency that is responsible for overseeing the regulation and licensing of abortion clinics pursuant to the Regulatory Act.
The Regulatory Act	A.R.S. §§ 36-449 through -449.03 and Title 9, Chapter 10, Article 15 of the Arizona Administrative Code, the statutes and regulations governing the licensing of abortion clinics in Arizona.
The State	The State of Arizona and its Legislature.
Vagueness DSOF	The defendants' joint Rule 1.10(*l*)(1) statement of undisputed facts in support of their partial motion for summary judgment on plaintiffs' vagueness claim.

Preliminary Statement

Although plaintiffs now complain that certain provisions of the Regulatory Act are "vague," they have had no difficulty in the past understanding identical or similar terms. The Regulatory Act requires abortion providers to have adequate facilities, clean equipment, and sufficient support staff–requirements very similar to the protocols and standards for abortion adopted by the National Abortion Federation and Planned Parenthood of Central and Northern Arizona, which many of the plaintiffs already follow and consider authoritative. Nothing in the Act is incomprehensible to ordinary people, nor does it leave law enforcement with unfettered discretion. Instead, all the Act requires is that abortion providers use common sense and reasonable medical judgment to ensure that abortion procedures are safe.

Unlike abortion-related regulations in other states that have been found unconstitutionally vague, the Regulatory Act has no bearing on *when, how or why* a woman can obtain an abortion. Nor does it set requirements for abortion providers that rely on the subjective views of patients regarding their care. Instead, it merely sets requirements that are intended to protect the health of women who seek abortions. Thus, the Regulatory Act does not restrict any constitutionally protected right; it simply attempts to make that right safer for women to exercise.

Background

Plaintiffs assert that the following statutes and rules are unconstitutionally vague on their face:

- A.A.C. R9-10-1506(A), which requires that abortion providers "ensure that there are a sufficient number of patient care staff and employees" to meet the patient's medical needs and to ensure her health and safety.
- A.A.C. R9-10-1506(B)(3), which requires that a nurse, nurse practitioner or a physician's assistant monitor a patient's recovery if a physician is not present.
- A.A.C. R9-10-1512(1), which requires abortion clinics to have "lighting and

ventilation to ensure the health and safety of a patient;" to be "maintained in a clean condition;" to be "free from a condition or situation that may cause a patient to suffer physical injury;" to be "maintained free from insects and vermin;" and to be "smoke-free."

- A.R.S. § 36-2301.02(E)(1), which requires a monthly report noting "[a]ny instances in which the contractor believes there was a significant inaccuracy in the estimated gestational age of the fetus made before the abortion."
- A.A.C. R9-10-1508(D)(3), which requires that an ultrasound showing a gestational age of greater than 12 weeks be "[i]nterpreted" by a physician.
- A.A.C. R9-10-1508(D) and R9-10-1508(H)(3), which require certain procedures regarding ultrasound prints where the gestational age of the fetus is greater than 12 weeks.

[Pls.' 4th Am. Compl. ¶¶ 59-62]

Argument

I. Ordinary People–Including the Plaintiffs–Can Understand The Regulatory Act.

In order to show that the laws in this case are unconstitutionally vague, plaintiffs must demonstrate that they are so unclear that "ordinary people can[not] understand what conduct is prohibited," and thus that people of common intelligence would be forced to "guess at the meaning of [the] words." *CISPES v. FBI*, 770 F.2d 468, 475, 476 (5th Cir. 1985) (finding that statute making it criminal to "coerce, threaten, intimidate, harass or obstruct" foreign officials was not unconstitutionally vague) (internal quotation omitted).

Plaintiffs do not, and cannot, point to any terms in the Regulatory Act that are not commonly understood. Plaintiffs are essentially complaining about such common and oft-used terms as "sufficient," "significant," "clean," "safe," "vermin-free," "smoke-free," and "present." Pointing to these terms, plaintiffs try "to create ambiguity where there is none. Such is the genius of a vagueness challenge because, in the extreme, words can always be said to be ambiguous." *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 214 (6th Cir.

1997) (Boggs, J., dissenting). Yet the plaintiffs cannot demonstrate why any person of common intelligence would be forced to "guess at the meaning of these words." *CISPES*, 770 F.2d at 476. For example, what reasonable person could not understand what "smoke-free" means?

Indeed, the plaintiffs themselves appear to understand the very terms about which they complain. For example, plaintiff Richardson testified that he set his practice up in compliance with the Regulatory Act–something he could not do if he did not understand the provisions of the Act. [Vagueness DSOF ¶ 4] In addition, when questioned about A.A.C. R9-10-1512(1) (requiring abortion clinic facilities to be clean, smoke-free, and vermin-free), at least three plaintiffs did not question the meaning of the regulation, and testified that their practices are in compliance with that provision. [*Id.*]

Because the terms in the Regulatory Act are commonly understood, they are not vague. *See, e.g., United States v. Monaco*, 194 F.3d 381, 386 (2nd Cir. 1999) (because "proceeds" was commonly understood, there was no vagueness problem in using the term), *cert. denied*, 529 U.S. 1077 (2000); *Gov't of the V. I. v. Steven*, 134 F.3d 526, 528 (3rd Cir. 1998) (because the phrase driving "under the influence" was commonly understood and used, statute making it illegal was not vague); *CISPES*, 770 F.2d at 477 (because the terms "coerce, threaten, intimidate, harass, or obstruct" were widely used in statutory contexts, they were not vague). Therefore, the Regulatory Act must be upheld.

II. THE SPECIFIC PROVISIONS OF THE REGULATORY ACT COMPLAINED OF ARE NOT VAGUE.

A. Health and Safety Guidelines Are Not Vague.

A number of the regulations that the plaintiffs allege are "vague" are nothing but routine health, safety and cleanliness guidelines. *See, e.g.*, A.A.C. R9-10-1506(A) (requiring a "sufficient number" of staff to fulfill the regulations, ensure patient safety and health, and meet the patient's medical needs); A.A.C. R9-10-1512(1) (requiring facilities to have sufficient lighting and ventilation and to be kept clean, smoke-free, free from insect and vermin, and free from conditions likely to cause injury to the patient). In fact, the licensing

regulations in question are very similar to regulations governing numerous other Arizona health care institutions, such as:

- *General Hospitals and Rural General Hospitals*: nursing departments must be "adequately staffed" and facilities must be kept "clean [and] free of insects, rodents, litter and rubbish." A.A.C. R9-10-215(B)(1); A.A.C. R9-10-220(B); A.A.C. R9-10-315(B)(1); A.A.C. R9-10-320(B).
- *Special Hospitals*: must have "sufficient number of appropriately qualified staff" and services "shall be available to meet the needs of patients." A.A.C. R9-10-436(A)(3); A.A.C. R9-10-436(A)(1). For substance abuse patients, the hospital must have "sufficient staff to assure the safety and welfare of the patients, and to achieve the objectives of the program." A.A.C. R9-10-438(B)(1).
- *Unclassified Health Care Institutions*: must be "adequately equipped and staffed by qualified personnel to meet the needs and assure the safety of persons attending the facility," and the facility and equipment must be "neat, clean, free of insects, rodents, litter and rubbish." A.A.C. R9-10-115(1); A.A.C. R9-10-115(3).
- *Assisted Living Facilities:* services must "meet a resident's scheduled and unscheduled needs" and the facility must be hazard-free, "[i]n good repair," "[c]lean," "[f]ree of odors," and "[f]ree of insects and rodents." A.A.C. R9-10-711(B)(2); A.A.C. R9-10-718(A)(1).
- *Nursing Care Institutions*: must provide activities to meet the "interests and the physical, mental, and psychosocial well-being of each resident" and the facilities must be "safe and sanitary." A.A.C. R9-10-909(C); A.A.C. R9-10-914(A)(1).[1]

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[1] This list is not exhaustive. Other health care institutions are also subject to similar (continued...)

Safety and health regulations, like the Regulatory Act, have been used and interpreted for many years in many contexts. In other words, the Regulatory Act is no different from standard, widely-used patient safety and health guidelines. Such regulations are easily understood and implemented, and thus are not vague.

B. Allowing the Exercise of Professional Judgment Is Not Vague.

Certain regulations that plaintiffs complain of simply require abortion providers to exercise their professional medical judgment. For example, A.A.C. R9-10-1506(A) requires a sufficient number of patient care staff and employees to: "1. Meet the requirements of this Article; 2. Ensure the health and safety of a patient; and 3. Meet the needs of a patient based on the patient's medical evaluation." Similarly, A.R.S. § 36-2301.02(E)(1) requires a contractor reviewing ultrasounds to report any "significant inaccuracy" in estimated fetal age.

Requirements such as having "sufficient staff" and determining what constitutes a "significant inaccuracy" only ask abortion providers to make the kind of judgments that medical professionals must make every day. The regulations allow providers to use their own medical judgment while still protecting patient health. Such requirements are not vague. *Cf., e.g., Women's Med. Ctr. of N.W. Houston v. Bell*, No. 00-20037, 2001 WL 370053, at *8 (5th Cir. Apr. 13, 2001) (abortion regulations measuring compliance based on the *patient's* "subjective expectations" as to her "dignity or self-esteem" are unconstitutionally vague).

In addition, medical personnel are held accountable in many contexts for failing to meet professional standards. *See, e.g., Karlin v. Foust*, 188 F.3d 446, 467-68 (7th Cir. 1999) (standard requiring physicians to use reasonable medical judgment was not void for vagueness, noting that doctors "operate under the spectre of civil liability for unreasonable medical judgments everyday"); *see also, e.g.*, A.R.S. § 32-1451 (subjecting physicians to discipline for being "medically incompetent" or for engaging in "unprofessional conduct").

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[1](...continued)
regulations. *See, e.g.*, A.A.C. R9-10-501 through -514 (adult day health care facilities); A.A.C. R9-10-1211 through -1230 (infirmaries); A.A.C. R9-10-1401 through -1412 (recovery care centers); A.A.C. R9-10-1701 through -1713 (outpatient surgical centers).

The Regulatory Act requires no more than other similar regulations. Similarly, the Regulatory Act imposes no greater penalty than other regulations governing the medical profession generally.[2]

Requiring physicians to exercise their medical judgment and competence in treating their patients does not render a law vague; instead, it ensures patient safety and health.

C. An Abortion Provider Can "Interpret" an Ultrasound Even If the Ultrasound Print Also Calculates Gestational Age.

Plaintiffs complain that A.A.C. R9-10-1508(D)(3), which requires a physician to "interpret" an ultrasound showing a gestational age of over twelve weeks, is vague because an ultrasound print itself calculates the gestational age; therefore, it is "unclear what a physician is required to 'interpret'." [Pls.' 4th Am. Compl. at ¶ 61] However, as with the other vagueness allegations plaintiffs have made, this claim lacks merit.

Although an ultrasound may calculate the gestational age, that does not render the term "interpret" incomprehensible. A physician can "interpret" the print by reading the picture, looking over the measurements, and determining whether he or she agrees with the ultrasound's conclusion. Indeed, Dr. Joel Bettigole, a Phoenix abortion provider, testified that he does exactly that. No abortions are performed in his practice without him reading and confirming a patient's ultrasound by checking the ultrasound's picture and measurements. [Vagueness DSOF ¶ 5] Similarly, plaintiff Dr. Raphael testified that he "interprets" the results of ultrasounds and does not rely on the machine to make the important determination of fetal age. [*Id.*]

The purpose of this regulation is clear–to double check the appropriateness of an abortion procedure in the more dangerous second trimester. Requiring a physician to read

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[2] The statutory scheme authorizes DHS to impose fines, injunctions, and license suspensions and revocations for violations. A.R.S. §§ 36-427 through -431.01. In addition, certain offenses can be classified as class 3 misdemeanors. A.R.S. § 36-431. While this is a criminal penalty, class 3 misdemeanors are the least severe under Arizona law and are limited to a maximum of thirty days imprisonment. A.R.S. § 13-707(A)(3). Moreover, the potential criminal penalty applies to all regulated health care institutions, not just to abortion providers.

an ultrasound print in this context is not vague; instead, it is simply sound medical practice.

D. The Fetal Age Regulations Are Not Unconstitutionally Vague.

Plaintiffs also complain about regulations A.A.C. R9-10-1508(D) and A.A.C. R9-10-1508(H)(3), which deal with ultrasounds showing a fetal age of 12 weeks or more. Plaintiffs argue that these regulations are vague because another regulation (A.A.C. R9-10-1501(17)) allows two methods of determining fetal age–by using either the first day of the woman's last period or the date of fertilization as a starting point. [Pls.' 4th Am. Compl. ¶ 60] This argument is also without merit.

Although plaintiffs have pointed to arguable ambiguities in the law, they have not pointed to any conduct that the Regulatory Act impermissibly *prohibits*. The vagueness doctrine is meant to ensure that people can understand what conduct is *not* allowed under the law; it is not meant to eliminate the possibility of more than one method of *compliance* with the law. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (void for vagueness doctrine rests on principle that law is unconstitutional "if its *prohibitions* are not clearly defined") (emphasis added). Plaintiffs are correct that A.A.C. R9-10-1501(17) allows two methods of interpreting gestational age; thus, the requirements that deal with ultrasounds showing a gestational age of 12 weeks or more can be met by using *either* method. Because plaintiffs cannot show that the fact that the law allows more than one interpretation would lead to any additional *prohibited* conduct (instead the law embraces two different methods as *permitted*), plaintiffs cannot show that such regulations are unconstitutionally vague.

III. The Amount of Discretion in Enforcement Allowed by the Regulatory Act Is Permissible.

Plaintiffs complain that they cannot be guaranteed that their "assessment" of the regulatory requirements will be the same as DHS's. That, however, does not render the regulations vague. That not every person may agree in every situation as to the exact application of each regulation is not relevant. "Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110 (ordinance banning any "noise or diversion which disturbs or tends to disturb the peace" was not

unconstitutionally vague).

As the Supreme Court explained in *Grayned*, "enforcement [always] requires the exercise of some degree of [] judgment." *Id.* at 114. Thus, the Supreme Court held in that case that because the purpose of an anti-disturbance restriction was clear–to avoid disruption of normal school activity–the degree of enforcement discretion was sufficiently confined and the law was not unduly vague. Similarly here, the meaning and purpose of the Regulatory Act's requirements are clear–to promote patient safety and health. Because the degree of judgment to be used by DHS is confined by the purpose of the regulations (and DHS's own mission to safeguard public safety and health), the amount of judgment allowed here is permissible.

Moreover, DHS has explained that it will reasonably interpret and enforce the regulations. Prior to conducting any inspections, the surveyors will be trained on the specific rules for abortion clinics and how to interpret them. [Vagueness DSOF ¶ 2] DHS will, if necessary, compile a "standardized set of things that we look for and how we expect them to be maintained." [*Id.*] DHS will also provide education, guidance and technical assistance to any provider and will give providers any written policies or interpretive guidelines that it develops. [*Id.* at ¶ 3] In addition, facilities will be given an opportunity to respond to any deficiency reports and argue why their behavior is in compliance with the regulations. [*Id.* at ¶ 1]

Because the Regulatory Act uses terms that have common, comprehensible meanings and there is no reason to believe that any of the regulations will be enforced in an arbitrary or overbroad manner, the Act must be upheld as constitutional on its face.

Conclusion

As a matter of law, none of the complained of statutes or regulations are unconstitutionally vague on their face. Accordingly, this court should grant the defendants' joint motion for partial summary judgment on vagueness grounds and dismiss plaintiffs' vagueness claim (Count V) with prejudice.

April 30, 2001.

Janet Napolitano
Attorney General

By Lynne C. Adams
Kevin D. Ray
Lynne C. Adams
Timothy C. Miller
Assistant Attorneys General
1275 W. Washington Street
Phoenix, Arizona 85007
(602) 542-1610

Richard M. Romley
Maricopa County Attorney

By Denise M Burke
Nikolas T. Nikas
Denise M. Burke
Stephen M. Crampton
Brian Fahling
Special Deputy Maricopa County Attorneys
c/o 16465 Henderson Pass, #1132
San Antonio, Texas 78232
(210) 494-7781

Copy mailed on April 30, 2001 to:

Ms. Bonnie Scott Jones
Ms. Julie Rikelman
THE CENTER FOR REPRODUCTIVE LAW & POLICY
120 Wall Street, 14th Floor
New York City, New York 10005
Attorneys for Plaintiffs

Elva Marling

Janet Napolitano
Attorney General
Firm State Bar No. 14000

Kevin D. Ray (007485)
Lynne C. Adams (011367)
Timothy C. Miller (016664)
Assistant Attorneys General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-1610

Attorneys for defendants Catherine Eden and Janet Napolitano

Nikolas T. Nikas (011025)
Denise M. Burke (admitted pro hac vice)
Stephen M. Crampton (admitted pro hac vice)
Brian Fahling (admitted pro hac vice)
Special Deputy Maricopa County Attorneys
c/o 16465 Henderson Pass, #1132
San Antonio, Texas 78232
(210) 494-7781

Attorneys for defendant Richard M. Romley

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THE DEFENDANTS' RULE 1.10(*l*)(1) STATEMENT OF FACTS IN SUPPORT OF THEIR JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' VAGUENESS CLAIM

Pursuant to Rule 1.10(*l*)(1), Local Rules of the District of Arizona, the defendants rely on the following facts in support of their joint motion for partial summary judgment on plaintiffs' vagueness claim (Count V):

1. In connection with DHS's evaluation of abortion facilities, inspectors (called "surveyors" by DHS) will tour each facility, review its written policies and procedures, review medical and personnel records, and interview staff, patients, and/or patient families, if possible. If a DHS surveyor finds a deficiency, he or she is required to file a deficiency report, specifying the violation that was found. [Blair dep. at 32] Once the surveyor files a deficiency report, the facility has an opportunity to respond and to document why it believes it is, in fact, in compliance with the Regulatory Act. [*Id.* at 98-99] The surveyor will then review the facility's response. If the surveyor still believe there is a deficiency, a team leader, program manager, other supervisor or the assistant director would review and resolve the matter. [*Id.* at 99]

2. Prior to conducting any inspections, DHS will train its surveyors about the Regulatory Act and how the rules are to be interpreted. [Blair dep. at 38-39] In performing inspections, DHS will rely on the rules as written and, when necessary, will compile a "standardized set of things that we look for and how we expect them to be maintained." [*Id.* at 59] Many of the rules are similar to those DHS applies to other medical facilities, so the methods for inspecting abortion clinics will be similar to what DHS already does in other inspections. [*Id.* at 39]

3. DHS will provide education, guidance and/or technical assistance regarding the Regulatory Act to any abortion provider that requests it or to any provider that DHS feels needs such assistance. [Blair dep. at 91, 100, 106] If DHS develops any written policies or interpretive guidelines related to the Regulatory Act, they will be made available to the public and copies will be provided to abortion providers. [*Id.* at 90] DHS may also conduct additional educational programs for providers, depending of the number of questions DHS receives from providers. [*Id.* at 91]

4. Plaintiff Richardson has set his practice up in compliance with the requirements of the Regulatory Act. [Richardson dep. at 33, 38-39, 84-85, 93-95, 100] At least three of the plaintiffs–Drs. Richardson, Raphael and Tamis–testified that their facilities are in compliance with A.A.C. R9-10-1512(1) and did not question the meaning of the regulation. [Richardson dep. at 93; Raphael dep. at 102-04; Tamis dep. at 118-19]

5. At least one of the plaintiffs already "interprets" the results of an ultrasound (as required by the Regulatory Act) and does not rely on the machine to make the important determination of fetal age. [Raphael 2d. dep. at 21] Dr. Joel Bettigole, a Phoenix abortion provider, also testified that no abortions are performed in his practice without him reading and confirming a patient's ultrasound by determining that the picture is well done and that the measurements are correct. Even if he did not actually perform the ultrasound, he will read and confirm it. [Bettigole 2d. dep. at 15]

April 30, 2001.

Janet Napolitano
Attorney General

By Lynne C. Adams
Kevin D. Ray
Lynne C. Adams
Timothy C. Miller
Assistant Attorneys General
1275 W. Washington Street
Phoenix, Arizona 85007
(602) 542-1610

Richard M. Romley
Maricopa County Attorney

By Denise M Burke
Nikolas T. Nikas
Denise M. Burke
Stephen M. Crampton
Brian Fahling
Special Deputy Maricopa County Attorneys
c/o 16465 Henderson Pass, #1132
San Antonio, Texas 78232
(210) 494-7781

Copy mailed on April 30, 2001 to:

Ms. Bonnie Scott Jones
Ms. Julie Rikelman
THE CENTER FOR REPRODUCTIVE LAW & POLICY
120 Wall Street, 14th Floor
New York City, New York 10005
Attorneys for Plaintiffs

Edna Martin

VAGUENESS
DEPOSITION EXCERPTS

Excerpts from Second Deposition of Joel Bettigole, M.D.
February 28, 2001

[15:06 - 15:18] Bettigole, Joel

Q. And you said that other people in your office perform ultrasounds on patients?

A. Yes, they do. But I read them.

Q. So you're always the one reading the ultrasounds?

A. They're reading them but nothing is done without me reading and confirming it.

Q. Basically, they'll read it and you'll come in and do a reading, also?

A. They may bring the picture to me in my office, and I will determine that the picture is well done and measurements are correct, and I will accept that based on that.

Excerpts from Deposition of Virginia Marie Blair
October 17, 2000

[32:02 - 32:24] Blair, Virginia

Q. And so these surveyors go out. What do they do when they get to the facility?

A. The process is to go to the administrator. Introduce ourselves. These are unannounced surveys, with the exception of the initial licensing surveys. Explain that the surveyor is there to conduct a relicensure inspection or a complaint investigation, as the case may be.

They do a tour of the facility. They review policies and procedures. Medical records. Personnel records. Interview staff. Patients. Patients' families, if that's possible. If there are deficiencies found, they write up a report on a specified form. That's sent to the facility. The facility responds to that.

Q. If there aren't deficiencies, is anything written up?

A. I'm sorry?

Q. If there are no deficiencies found, is anything written up?

A. They are sent the same form, and it says there were no deficiencies found at the time of the survey conducted on whatever the date was.

[38:24 - 39:18] Blair, Virginia

Q. Will inspectors of the facilities where abortions are performed be given specific training in

enforcing the regulatory scheme?

A. They will receive training in the regulations and how to interpret them.

Q. What will that training consist of?

A. We will go through the regulations.

Q. Will you personally?

A. I may be one of the people who does that. There may be others. We will go through the regulations. Discuss what each regulation is. What we might look for. Want to look for. Many of these regulations are similar to other regulations. So the methods will be similar to what we already do.

Q. Will they receive training specifically related to confidentiality of records?

A. They already have that. All surveyors are required to keep confidential information that might identify a patient, a patient's family, a source of a complaint. It's required in statute.

[59:08 -59:15] Blair, Virginia

Q. Who will decide how the rules that are promulgated will be interpreted?

A. Insofar as the rules are written, we try to make sure they're as clear as possible. Where there's a possibility of needing to know what to look at to verify compliance, we discuss that within the program and arrive at a rather standardized set of things that we look for and how we expect them to be maintained.

Excerpts from Deposition of Damon Raphael
October 11, 2000

[102:17 - 104:08] Raphael, Damon

Q. Okay. Again, Doctor, if you could review 1512 and tell me if there's anything you feel is inappropriate or not within medical standards.

A. Again, I do not object to what's in 1512, except to say that they are redundant, that they are required by CLIA and the -- but probably unnecessary. But on their face I don't object to them.

Q. And you're obviously --

A. We are in compliance with all this stuff

because we're CLIA compliant.

Q. Doctor, if you could review 1513 and tell me if there's anything in there that you find inappropriate or not within medical standards.

A. We comply with everything in 1513.

Q. Let me ask you a couple of questions related to that, Doctor.

Do you maintain log books, to your knowledge, dealing with the calibration and testing of the equipment in your office?

A. To my knowledge we do.

Q. And do you happen to know where those are maintained?

A. I don't know, but my clinic manager could tell you.

Q. But you do maintain the logs?

A. We do.

Q. Okay. Doctor, finally, if you could look at 1514 for me and tell me if anything in there is inappropriate or not within acceptable medical standards.

A. We comply with everything in here. There is ambiguity involving 1B, a place for a patient to dress. Does that mean that there has to be a designated place to dress which is separate from an

ordinary bathroom, et cetera, et cetera?

We have bathrooms for patients to do that, or in recovery, but we don't have a special designated dressing room where we send patients to dress or undress.

Q. Okay.

A. Other than that, we comply with all of this.

Excerpts from Second Deposition of Damon Raphael, M.D.
February 28, 2001

[21:08 - 21:18] Raphael, Damon

Q. And at one point in the static I heard you ask me "Do I put anything in there about my interpretation of the report"?

A. That's what I mean. That's what I'm saying. That's what I assume you meant by whether -- how I interpreted it. In other words, if there was any particular comments. That's what I'm talking about.

Q. So when you're looking at an ultrasound on a machine, you're obviously, as a physician, interpreting the results that you're seeing?

A. That's correct.

Excerpts from Deposition of William Richardson, M.D.
October 20, 2000

[33:02 - 33:25] Richardson, William

Q. You are familiar with CLEA?
A. Yes.
Q. What laboratory services does your office provide?
A. We provide hematocrit screening, Rh blood typing, wet mount, and stool for occult blood.
Q. All right. Do you believe that these laboratory guidelines -- having these laboratory guidelines is good medical practice?
A. That's not a yes or no question. The laboratory guidelines in part were formulated to adhere to CLEA regulations, but they were also formulated with the knowledge that so-called abortion clinic regulations would be coming, and it was partly in response to that as well.
Q. Do you perform all the laboratory procedures in your office?
A. Personally?
Q. Yes.
A. No.
Q. Do you expect the people who are performing laboratory procedures in your office to follow these guidelines?
A. Yes.

Q. In your view does the surgical and medical abortion policies and procedures for Old Pueblo Family Planning comply with the regulations the Health Department has passed?

A. Yes.

Q. Okay. Now in addition there's a document numbered 698 to 739. And it reads at the top, "Table of Contents," but in handwriting up at the top right-hand corner it says, "NAF 2000 Guidelines"?

A. Yes.

Q. Are you familiar with this document?

A. Yes.

Q. And are these National Abortion Federation 2000 documents?

A. Yes.

Q. And do you consider the National Abortion

Federation an authoritative source for good medical practices in this field?

A I consider the National Abortion Federation the source in this field.

Q And are your policies and procedures for Old Pueblo Family Planning designed to comply with NAF Guidelines?

A Yes.

Q. Then I guess we're to R9-10-1508, Abortion Procedures. Again, I understand your umbrella objection to this. Are there any procedures in R9-10-1508 that are inconsistent with your policies and procedures that you've adopted for your clinic?

A. Since my policies and procedures were adopted with the regulations in mind, I'm hoping not.

Q. Okay. And we have them here if you want to look at them?

A. No. So is that your question for this section?

Q. Yes. Are there any provisions in this section that are inconsistent with the policies and procedures for your office?

A. No.

Q. Let's go to R9-10-1509 then. It's entitled, "Patient Transfer and Discharge." Are there any requirements in here that are inconsistent with your policies and procedures for your practice?

A. Again, my policies and procedures in this area were adopted with these regulations in mind, so no.

Q. So these are things that you can do and do do?

A. These are things that I do.

Q. Going to page -- or to Section R9-10-1514, Physical Facilities, on Page 27. Does your private medical office comply with these requirements?

A. At somewhat increased overhead, yes.

Q. Okay. So you already do comply with these requirements now?

A. Right, in anticipation of these regulations I complied. For instance, I probably wouldn't have knocked a door out and had it expanded to 36 inches.

Q. All right. So that did cost you some money?

A. Oh, yeah, among other things.

Q. Okay. Do you recall how much it cost you

to expand the door to 36 inches?

A. No, he just sent me a general bill.

Q. Okay.

A. He probably did itemize it.

Q. Was it a general bill for construction services or remodeling services?

A. When I moved in my building, I had it gutted and completely remodeled.

Q. I see.

A. And in that remodeling I explained to him what the regulations were. He added onto the price accordingly.

Q. So the gutting and remodeling in addition

to complying with these regs was to comply with your own requirements for what you wanted that facility to be like?

A. Part of the gutting and remodeling was for that purpose. Some of it was also to comply with the regulations.

Q. Is your private -- was your private medical office formerly a residence?

A. I think it was a gastroenterologist's office before.

Q. Okay. So it was formerly a medical office?

A. Yes.

Q. But --

A. From the '70s.

Q. So you felt that there were changes that needed to be made?

A. Yes.

[100:03 - 100:21] Richardson, William

Q. Now we've talked several times here that a lot of what you did in setting up your practice was in anticipation of the regulations that are the subject of this lawsuit, correct?

A. Yes.

Q. Other than preparing the specific policy guidelines and looking at how the physical setup of your office was, was there anything else that you did in anticipation of these regulations relative to your practice?

A. In every aspect of the, you know, formulation and execution of my practice the regulations were one of the, you know, screens through which I viewed it. Not the only, but one of them.

Q. And the other screen would be maybe the NAF Guidelines or what else?

A. The first was whether or not it makes sense medically, and then secondarily, to adhere to NAF and the regulations in CLEA and OSHA.

Excerpts from Deposition of Robert H. Tamis, M.D.
October 13, 2000

[118:18 - 119:23] Tamis, Robert

Q. Doctor, let me just walk you through some of these 1512. Do you believe it is important to provide lighting and ventilation to ensure the health and safety of you patients?

A. Yes. I do.

Q. Do you maintain your facility in a clean condition?

A. Yes. I do.

Q. Is your facility free from a condition or situation that may cause a patient to suffer physical injury?

A. I believe so.

Q. Is your facility free from insects and vermin?

A. Except the Right-to-Lifers that walk through there, yes.

Q. Is your facility smoke-free?

A. Except for the patients who smoked when they are not supposed to.

Q. Do you have a sign posted or do you tell your patients not to smoke?

A. We tell them not to smoke. I don't think we have a sign posted.

Q. Do you have oxygen in your facility?

A. Yes. I do.

Q. Do you post a warning notice at the

entrance of the room in the area where the oxygen is located?

A. No, we don't, because it is in the operating room and nobody goes in there with a cigarette.