Abortion Providers’ Admitting Privileges Act

Model Legislation & Policy Guide
For the 2015 Legislative Year

Changing Law to Protect Human Life, State by State
INTRODUCTION

The U.S. Supreme Court last decided a major abortion case in 2007 when it upheld the constitutionality of the federal ban on partial-birth abortion; however, both pro-life advocates and abortion activists are already eagerly anticipating the Court’s “next big” abortion case. As a result of state legislators’ growing commitment to protecting women from the all-too-common substandard practices in abortion clinics, momentum is already building for the Justices to decide the constitutionality of state laws requiring abortion providers to maintain hospital admitting privileges.

The need for such lifesaving requirements is clear. Relying on the abortion industry’s own conservative estimates of complication rates along with the pro-abortion Guttmacher Institute’s latest report on induced abortions, in 2011 alone, more than 26,000 women experienced abortion-related complications, and more than 3,000 of these women required hospitalization. Admitting privileges requirements are necessary to ensure that these women receive high-quality, post-abortive and emergency care.

Seventeen states currently require abortion providers to have admitting privileges or a patient transfer agreement with a physician who maintains such privileges. Despite the fact that these requirements are designed to protect women’s health and safety and to facilitate proper care in a medical emergency, abortion providers and abortion advocacy groups have filed federal legal challenges against recently enacted admitting privileges requirements in Alabama, Mississippi, Texas, and Wisconsin, callously contending that the requirements are burdensome and unnecessary.

In late 2013, the Seventh Circuit refused to overturn a lower court’s preliminary injunction prohibiting enforcement of Wisconsin’s admitting privileges requirement. Instead, the court found that legislators had not demonstrated a need for the requirement, and that they had acted improperly by imposing the requirement only on abortion providers and not on other categories of physicians.

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2 Abortion providers repeatedly cited to data demonstrating that 2.5% of women who have first-trimester abortions “undergo minor complications,” while fewer than 0.3% experience complications requiring hospitalization. See e.g., Planned Parenthood v. Abbott, No. 13-51008 at *8 (5th Cir. Mar. 27, 2014), available at http://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-51008-CV1.pdf (last visited July 11, 2014). See also, “Induced Abortion in the United States,” dated February 2014, available at http://www.guttmacher.org/pubs/fb_induced_abortion.html (last visited July 11, 2014), where Guttmacher reported 1.06 million abortions in 2011. (NOTE: This data is used for illustrative purposes only. AUL does not affirm the accuracy or reliability of the abortion industry’s data or contentions.)
Conversely, in March 2014, the Fifth Circuit reached the opposite conclusion as to Texas’ admitting privileges requirement. A panel of three female judges determined that the requirement was constitutional and clearly protective of women’s health.\(^4\)

Notably, the Fifth Circuit explicitly rejected the Seventh Circuit’s flawed analysis. As to the “need” for admitting privileges, the Fifth Circuit found that Texas had a rational basis for enacting the requirement: “the desirable protection of abortion patients’ health.”\(^5\) The court also noted that Dr. John Thorp, a professor at the University of North Carolina School of Medicine and one of the State’s experts, “offered the most comprehensive statement” in support of the admitting privileges requirement:

> There are four main benefits supporting the requirement that operating surgeons hold local hospital admitting privileges and staff privileges: (a) it provides a more thorough evaluation mechanism of physician competency which better protects patient safety; (b) it acknowledges and enables the importance of continuity of care; (c) it enhances inter-physician communication and optimizes patient information transfer and complication management; and (d) it supports the ethical duty of care for the operating physician to prevent patient abandonment.\(^6\)

Other medical experts have testified that admitting privileges requirements benefit abortion patients by screening out “untrained and incompetent abortion providers” and by acting “as another layer of protection for patient safety.”\(^7\) Importantly, the “specter of Kermit Gosnell” has precipitated an acknowledgement that the credentialing process entailed in admitting privileges requirements reduces “the risk that abortion patients [will] be subjected to woefully inadequate treatment.”\(^8\)

With the myriad of litigation surrounding admitting privileges requirements, it is only a matter of time before the U.S. Supreme Court is asked to rule on the constitutionality of these requirements. In fact, the conflicting decisions from the Seventh and Fifth Circuits increase the probability that the Supreme Court will ultimately decide to review one or both cases. Further, the Supreme Court’s own words would also appear to increase the chances of the Court weighing in on the constitutionality of admitting privileges requirements for abortion providers.

In November 2013, abortion advocates asked the Supreme Court to enjoin the enforcement of the Texas admitting privileges requirement while litigation over its constitutionality continued. By a

\(^5\) Id. at *16.
\(^6\) Id. at *11.
\(^7\) Id. at *12.
\(^8\) Id. at *16.
5 to 4 vote, the Supreme Court refused this request.\textsuperscript{9} However, in a somewhat unusual move, Justice Stephen Breyer, writing for the four Justices who felt that the law should have been enjoined, specifically stated that

\begin{quote}
[T]he underlying legal question—whether the new Texas statute is constitutional—is a difficult question. It is a question, I believe, that at least four Members of this Court will wish to consider irrespective of the Fifth Circuit’s ultimate decision.\textsuperscript{10}
\end{quote}

As review is granted upon the votes of only four Justices, this sentiment would strongly suggest that imminent Supreme Court review of state laws requiring abortion providers to maintain hospital admitting privileges is likely. Such an outcome would provide a welcomed opportunity to demonstrate both that the requirements are medically justified, and that abortion is not “safe” for either women or their unborn children.

To help ensure women’s health and safety, AUL has drafted the \textit{Abortion Providers’ Admitting Privileges Act}. For more information or assistance with this model language, please contact AUL’s Legislative Coordinator at (202) 298-1478 or Legislation@AUL.org.

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ABORTION PROVIDERS’ ADMITTING PRIVILEGES ACT

HOUSE/SENATE BILL No. ________________
By Representatives/Senators ________________

Section 1. Title.

This Act may be known and cited as the “Abortion Providers’ Admitting Privileges Act.”

Section 2. Legislative Findings and Purposes.

(a) The Legislature of the State of [Insert name of State] finds that:

(1) The [vast majority] of all abortions in this State are performed in clinics devoted primarily to providing abortions and family planning services. Most women who seek abortions at these clinics do not have any relationship with the physician who performs the abortion either before or after the procedure. They do not return to the facility for post-surgical care. In most instances, the woman’s only actual contact with the abortion provider occurs simultaneously with the abortion procedure, with little opportunity to ask questions about the procedure, potential complications, and proper follow-up care.

(2) In some cases, abortion providers travel into [Insert name of State] from other states [or locations] to perform abortions at abortion clinics in this State. These physicians typically do not live in or remain in this State when not providing abortions or abortion-related services.


(4) Abortion is an invasive, surgical procedure that can lead to numerous and serious (both short- and long-term) medical complications. Potential complications for abortion include, among others, bleeding, hemorrhage, infection, uterine perforation, uterine scarring, blood clots, cervical tears, incomplete abortion (retained tissue), failure to actually terminate the pregnancy, free fluid in the abdomen, acute abdomen, organ damage, missed ectopic pregnancies, cardiac arrest, sepsis, respiratory arrest, reactions to anesthesia, and even death.
(5) The risks for second-trimester abortions are greater than for first-trimester abortions. The risk of hemorrhage, in particular, is greater, and the resultant complications may require a hysterectomy, other reparative surgery, or a blood transfusion.


(9) The U.S. Supreme Court has specifically acknowledged that a State has “a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise.” *Roe v. Wade*, 410 U.S. 113, 150 (1973).

(10) Among the benefits supporting an admitting privileges requirement for abortion providers are that it

a. Provides a more thorough evaluation mechanism of physician competency which better protects patient safety;

b. Acknowledges and enables the importance of continuity of care;

c. Enhances inter-physician communication and optimizes patient information transfer and complication management; and

d. Supports the ethical duty of care for the operating physician to prevent patient abandonment.
(b) Based on the findings in subsection (a), it is the purpose of this Act to provide for the protection of public health generally and of women’s health and safety specifically through the establishment and enforcement of an admitting privileges requirement for physicians providing abortions in [freestanding] abortion clinics in this State.

Section 3. Definitions.

As used in this Act only:

(a) “Abortion” means the act of using or prescribing any instrument[, medicine, drug, or any other substance, device, or means]\(^{11}\) with the intent to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child. Such use[, prescription, or means] is not an abortion if done with the intent to:

1. Save the life or preserve the health of the unborn child;
2. Remove a dead unborn child caused by spontaneous abortion; or
3. Remove an ectopic pregnancy.

(b) “Abortion clinic” means a facility, other than an accredited hospital, in which five (5) or more first-trimester abortions in any month or any second- or third-trimester abortions are performed.

(c) “Admitting privileges” means the right of a physician[, by virtue of membership with a hospital's medical staff,] to admit patients [from an abortion clinic] to a particular hospital for the purposes of providing specific diagnostic or therapeutic services to such patient in that hospital.

(d) “Physician” means a person licensed to practice medicine in the State of [Insert name of State]. This term includes medical doctors and doctors of osteopathy.

Section 4: Admitting Privileges Requirement.

On any day when any abortion is performed in an abortion clinic, a physician with admitting privileges at an accredited hospital in this State and within thirty (30) miles of the abortion clinic must remain on the premises of the abortion clinic to facilitate the transfer of emergency cases if

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\(^{11}\) The bracketed language is used when state officials intend the requirements prescribed herein to apply to the administration or provision of abortion-inducing drugs (such as RU-486).
hospitalization of an abortion patient or a child born alive is necessary and until all abortion patients are stable and ready to leave the recovery room.

Section 5. Civil Penalties and Fines.

(a) Any violation of this Act may be subject to a civil penalty or fine up to [Insert appropriate amount] imposed by the [state Department of Health or other appropriate department or agency].

(b) Each day of violation constitutes a separate violation for purposes of assessing civil penalties or fines.

(c) In deciding whether and to what extent to impose fines, the [state Department of Health or other appropriate department or agency] shall consider the following factors:

(1) Whether physical harm to a patient or a child born alive has occurred;

(2) Severity and scope of the actual or potential harm;

(3) Any indications of good faith exercised by the abortion clinic involved in the violation to comply with the requirements of this Act;

(4) The duration, frequency, and relevance of any previous violations of this Act by the abortion clinic; and

(5) Financial benefit to the abortion clinic of committing or continuing the violation.

(d) Both the Office of the Attorney General and the Office of the District Attorney [or other appropriate title or designation] for the county in which the violation occurred may institute a legal action to enforce collection of civil penalties or fines.

Section 6. Injunctive Remedies.

In addition to any other penalty provided by law, whenever in the judgment of the [Director [or other appropriate title or designation] of the Department of Health or other appropriate department or agency], any person has engaged, or is about to engage, in any acts or practices which constitute, or will constitute, a violation of this Act, the [Director [or other appropriate title or designation] of the Department of Health or other appropriate department or agency]
shall make application to any court of competent jurisdiction for an order enjoining such acts and practices, and upon a showing by the [Director [or other appropriate title or designation] of the Department of Health or other appropriate department or agency] that such person has engaged, or is about to engage, in any such acts or practices, an injunction, restraining order, or such other order as may be appropriate shall be granted by such court without bond.

**Section 7. Construction.**

(a) Nothing in this Act shall be construed as creating or recognizing a right to abortion.

(b) It is not the intention of this Act to make lawful an abortion that is currently unlawful.

**Section 8. Right of Intervention.**

The [Legislature], by joint resolution, may appoint one or more of its members, who sponsored or cosponsored this Act in his or her official capacity, to intervene as a matter of right in any case in which the constitutionality of this Act or any portion thereof is challenged.

**Section 9. Severability.**

Any provision of this Act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable herefrom and shall not affect the remainder hereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

**Section 10. Effective Date.**

This Act takes effect on [Insert date].
STATE OF THE STATES: WHERE ARE WE NOW? 
ADMITTING PRIVILEGES FOR ABORTION PROVIDERS

Thirteen states maintain an enforceable admitting privileges requirement for abortion providers: AL, AZ, IN, KY, LA, MS, MO, ND, OK, SC, TN, TX, and UT.

Three states require abortion providers to have transfer agreements to facilitate hospital admissions and to provide continuity of care for abortion patients: OH, PA, and VA.

Four states have admitting privileges requirements in litigation: AL (2013 law), MS (2012 law), Texas, and WI.

NOTE: Alabama and Mississippi maintain earlier, enforceable admitting privileges requirements while their more recent laws are in litigation. Texas’ 2013 requirement is enforceable while litigation continues as to its constitutionality.
More detailed information about the need and justification for comprehensive health and safety regulations for abortion clinics, including admitting privileges requirements, can be found in AUL’s annual publication *Defending Life*.

*Defending Life 2014* is available at AUL.org.

For further information regarding this or other AUL policy guides, please contact:

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