

August 23, 2004

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

Re: Whether subchapter A of chapter 71, Civil Practice and Remedies Code, requires a physician to report the use of controlled substances by a patient who is pregnant (Request No. 0250-GA)

Dear General Abbott:

We are physicians, health care professionals, medical ethicists, midwives, child-welfare advocates, public health advocates, women's rights advocates and researchers and we are writing to express our grave concern about S.B. 319 (2003 TEX. GEN LAWS ch. 822). This law has been wrongly invoked to require physicians to report pregnant patients who are using or have used controlled substances during their pregnancy to local law enforcement agencies or to the Department of Protective and Regulatory Services.

Specifically, three weeks after SB 319 was enacted, District Attorney Rebecca King of Potter and Armstrong Counties notified physicians that they were obligated to report pregnant, drug-using women to the authorities. Ms. King's directive is wrong on two counts. First, there is no basis for Ms. King's novel theory that SB 319 permits prosecutions of women by claiming drug "delivery" to include ingestion of controlled substances by pregnant women to their unborn fetus -- SB 319 did not even purport to amend the Controlled Substances Act. Moreover, Ms. King's opinion that physicians are now required to report confidential patient information to authorities is simply incorrect. SB 319 did not amend any of the provisions governing physician/patient confidentiality or child abuse reporting in this state.

Worse, Ms. King has erroneously prosecuted at least two women under this law, despite the fact that the author of S.B. 319 has stated that these prosecutions directly contradict the legislature's intent. If no measures are taken to clarify the proper interpretation of these new provisions, women across the state who were never meant by the legislature to be treated as criminals will be arrested and prosecuted because of their addictions.

While we do not condone the use of any substance that might have a negative impact on pregnancy outcomes, our commitment to the care of pregnant women and their children requires us to speak out against dangerous and counterproductive measures such as the arrest and prosecution of pregnant women based on confidential health information provided to authorities by their medical provider.

As every leading medical organization to address this issue has concluded, the problem of alcohol and drug use during pregnancy is a health issue best addressed through education and community-based treatment, not through the criminal justice system. Just a few of the

organizations who have spoken out on this issue include the American Medical Association,¹ the American College of Obstetricians and Gynecologists,² the American Nurses Association,³ the American Academy of Pediatrics,⁴ and the March of Dimes.⁵

Health risks to women, fetuses, and children, whether from poverty, inadequate nutrition, exposure to alcohol, drugs, or other factors can be mitigated through prenatal care, counseling, and continued medical supervision. According to a Texas survey of postpartum women and drug-exposed infants “infants born to women obtaining adequate prenatal care were healthier, even among substance-using mothers.”⁶ Indeed, prenatal care has been shown to markedly improve pregnancy outcomes among women with addictions. For prenatal care and other interventions to be effective, however, the patient must trust her health care provider to safeguard her confidence and stand by her while she attempts to improve her health and best care for the health of her fetus. Converting the physician’s exam room into an interrogation chamber and turning health care professionals into agents of law enforcement erodes this trust. Prosecutor King’s letter to physicians, and the interpretation of the law she advances, will deter women from seeking prenatal care. Moreover, King’s mandate contradicts the most basic tenets of physician-patient confidentiality as protected by both Texas and federal statutes.

Drug dependency is a medical condition and should not be treated as a crime. Like other medical conditions, drug dependency can be controlled and overcome through medical treatment. However, medical knowledge about addiction and dependency treatment demonstrates that patients do not, and cannot, simply stop their drug use as a result of threats of arrest or other negative consequences. In fact, threat-based approaches simply discourage pregnant and parenting women from seeking prenatal care and drug and alcohol treatment.

Throughout the country, there is a dearth of drug treatment options for pregnant and parenting women. Such women have specialized drug treatment needs, including prenatal care, child care, and medical care for infants and children. In addition, studies indicate that many women drug-users have experienced sexual and physical abuse, medical and mental health problems, including depression and post traumatic stress disorder. Moreover, women generally have primary caretaking responsibilities for their families as well as high levels of shame and guilt related to their substance use. According to the Texas survey on postpartum women and drug-exposed infants, Texas women in particular face problems getting child care, dealing with financial issues, transportation, language barriers, and “difficulty finding Texas programs geared

¹ The Board of Trustees of the American Medical Association determined that where the criminal justice systems are used to deal with drug-abusing mothers, “[p]regnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians’ knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment.” American Medical Association, Legal Intervention During Pregnancy, 264 JAMA 2663, 2667 (1990).

² American College of Obstetricians and Gynecologists, Substance Abuse in Pregnancy 195 ACOG Technical Bulletin 1 (1994)

³ American Nurses Association, *Position Statement* (April 5, 1992)

⁴ American Academy of Pediatrics, Committee on Substance Abuse, Drug-Exposed Infants, 86 Pediatrics 639, 642 (1990).

⁵ March of Dimes, Statement on Maternal Drug Abuse 1 (Dec. 1990).

⁶ Texas Commission on Alcohol and Drug Abuse, “1990 Texas Survey of Post-Partum Women and Drug-Exposed Infants,” June 1991, 39.

toward women's needs.”⁷ The development of comprehensive, non-threatening treatment programs that address these therapeutic, educational and logistical needs, and ones that do not separate mothers from their children, are necessary to assist women and their families.

According to a recent national survey, Texas ranks 46th out of all states in providing adequate health care for women.⁸ Texas ranks particularly low in providing first trimester prenatal care to pregnant women, and has a relatively high percentage of low birth-weight babies and infant mortality rates.⁹ Any efforts which would further undermine women's access to prenatal care and treatment would almost surely exacerbate Texas' existing public health problems with respect to women.

Unfortunately, many people find it difficult to obtain the help they need to overcome their alcohol and drug dependency problems. Arresting pregnant women with these problems not only deters them from seeking help – it is likely to deter others from offering compassion and providing the resources necessary to develop and fund the kinds of treatment they need.

We therefore ask you, in the interests of maternal, fetal, and child health, to consider that the intent of this law was to protect women and their unborn children and to recognize that using the law in the manner proposed by Prosecutor King undermines this very important goal.

Signed,

American College of Obstetricians and Gynecologists
American Association for the Treatment of Opioid Dependence
American Society of Addiction Medicine
ACLU of Texas
Citizens for Midwifery
Doctors of the World USA
Drug Policy Alliance
Gay Men's Health Crisis
Global Lawyers & Physicians
The Hygeia Foundation and Institute for Perinatal Loss and Bereavement
Maternity Center Association
National Advocates for Pregnant Women
National Association of Nurse Practitioners in Women's Health
National Association of Social Workers, Texas Chapter
National Coalition for Child Protection Reform
National Council on Alcoholism and Drug Dependence
National Organization for Women, North Dallas Chapter
National Women's Health Network
Our Bodies Ourselves

⁷ Ibid, 40, 42.

⁸ National Women's Law Center, Oregon Health & Science University, "Making the Grade on Women's Health" 2004, 100-101.

⁹ Annie E. Casey Foundation, Kids Count 2004 Data Book Online, Profile for Texas, <<http://aecf.org/kidscount/>>

Physicians for Reproductive Choice and Health
Planned Parenthood of Amarillo and the Texas Panhandle
Texas Association of Obstetricians and Gynecologists
Women's Health and Family Planning Association of Texas
Women's Law Project

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