OPINION
74-463

December 27, 1974 (OPINION)

The Honorable Myron H. Atkinson, Jr.
State Representative, 32nd District
P.O. Box 1176
Bismarck, North Dakota 58501

Dear Representative Atkinson:

This is in reply to your letter of December 14, 1974, relative to the North Dakota abortion statutes. You state the following facts and questions:

> "In connection with the recent Federal Court decision relating to the abortion laws in North Dakota, a number of questions have been raised as to what laws may still have an application to abortion procedures.
>
> "Could your office please furnish me with its opinion on the following questions.
>
> 1. "Is abortion done at any stage of pregnancy and for any reason considered a medical procedure under the laws of North Dakota?
>
> 2. "Can an individual other than a licensed physician practicing in the State of North Dakota perform an abortion at any stage of pregnancy, or would such a procedure be subject to prosecution and possible conviction under the Medical Practice Act?
>
> 3. "If a nonlicensed physician performed an abortion, what would be the penalty upon conviction if such is an offense?
>
> 4. "In addition to possible criminal prosecution, could an individual other than a licensed physician be subject to civil damages for injuries resulting from performance of an abortion at any stage of pregnancy?
>
> 5. "Does Section 23-16-14 N.D.C.C. grant immunity to all individuals and all institutions, both public and private, who refuse to perform or allow to be performed an abortion procedure because of objection based on such religious or moral grounds as such party may choose?"

As you are aware, the recent decision of the Federal District Court for North Dakota in the case of Lee v. Olson, (Civil No. A2-74-43) decided on November 26, 1974, held sections 12-25-01 through 12-25-04 of the N.D.C.C. unconstitutional and void. The decision did not directly involve the questions which are raised in your letter although the result of the invalidity of such statutes would appear to make certain of the questions more pertinent. Our responses to the questions are in the order in which the questions are listed.

1. The practice of medicine is defined by section 43-17-01(2) of the N.D.C.C., as amended, as follows:

"'Practice of Medicine' shall include the practice of medicine, surgery, and obstetrics. The following persons shall be regarded as practicing medicine:

a. One who holds himself out to the public as being engaged within this state in the diagnosis or treatment of diseases or injuries of human beings;

b. One who suggests, recommends, or prescribes any form of treatment for the intended relief or cure of any physical or mental ailment of any person, with the intention of receiving, directly or indirectly, any fee, gift, or compensation.

c. One who maintains an office for the examination or treatment of persons afflicted with disease or injury of the body or mind;

d. One who attached the title M.D., surgeon, doctor, D.O., osteophathic physician and surgeon, or any other similar word or words or abbreviation to his name, indicating that he is engaged in the treatment or diagnosis of the diseases or injuries of human beings shall be held to be engaged in the practice of medicine;

* * *

While there may be some question as to whether abortion would constitute a disease of injury or physical or mental ailment within the above-quoted definition, we believe the term is encompassed within the word "obstetrics." That term is not defined by statute and must be construed in its normal sense. See section 1-02-02 of the N.D.C.C. The term "obstetrics" is defined by Webster's Seventh New Collegiate Dictionary as follows: "a branch of medical science that deals with birth and its antecedents and sequels." While abortion may not, in many instances, be legally considered a birth, it would, in our opinion, be an antecedent to birth and abortion would therefore come within the definition of obstetrics and thus within the definition of practice of medicine as defined above.

In direct response to your first question, it is our opinion that abortion done at any state of pregnancy and for any reason is considered a medical procedure under the laws of North Dakota.

2. In view of our answer to the first question, it necessarily follows that an individual other than a licensed physician may not perform an abortion at any stage of pregnancy and such a procedure, if not accomplished by a licensed physician, would be subject to the provisions of Chapter 43-17 of the N.D.C.C., as amended, governing physicians and surgeons, and the limitations, exclusions and penalties therein contained.

In reaching this conclusion we are aware of the decision of the United States Supreme Court in Roe v. Wade, 410 U.S. 113, 35 L.Ed.2d. 247, in which the Court stated, page 163 of the U.S. Reporter: "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, 35 L.Ed.2d., 174, 175, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like."

This statement by the Court leaves no doubt that after the first trimester of pregnancy the State may regulate the abortion procedures. The quote may also lead to the conclusion that prior to that time there is no restriction, including requiring the performance of the abortion procedure by a licensed physician, which can be enforced by the state. However we note the further statement of the Court, at page 410 of the U.S. Reporter:

> "This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." (emphasis ours)

While this statement supports the position that the State cannot interefere with the abortion procedure during the first trimester, the statement also supposes the attendance of a physician and, until the court clearly defines its position in this regard, we adhere to the conclusion that even during the first trimester of pregnancy an abortion may be performed in North Dakota only in accordance with the provisions of Chapter 43-17 of the N.D.C.C., as amended, governing physicians and surgeons.

This is in accordance with a decision of the Federal District Court of Minnesota in Hodgson v. Anderson, 378 F. Supp. 1008 (1974) in which the Court stated, page 1016 of the reported case: "Except in the context of its right to generally regulate professional standards relating to the practice of medicine, any attempt to regulate abortion prior to viability is unconstitutional unless the regulation is for the period after the approximate end of the first trimester and is reasonably related to the woman's health."

The conclusions we have reached above are based on the general

professional standards relating to the practice of medicine and are not directed to regulating abortion as such and therefore would fall within the statement in the Hodgson case, supra.

3. Section 43-17-34 of the N.D.C.C. provides:

> "PRACTICING WITHOUT A LICENSE - VIOLATION OF CHAPTER PENALTY. - Any person who practices medicine in this state without complying with the provisions of this chapter is guilty of a misdemeanor. In addition to the criminal penalties provided the civil remedy of injunction shall be available to restrain and enjoin violations of any provisions of this chapter without proof of actual damages sustained by any person."

Since no penalty for conviction of the misdemeanor is specified in the statute, the matter would be governed by section 12-06-14 of the N.D.C.C., as amended, which provides:

> "PUNISHMENT OF MISDEMEANOR. - Except in cases where a different punishment is prescribed by law, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment."

Thus if a nonlicensed physician not exempted from chapter 43-17, N.D.C.C. performed an abortion the penalty upon conviction could be a maximum one year jail sentence in the county jail and/or a fine of not more than five hundred dollars.

4. Section 43-17-34 of the N.D.C.C. does provide for a civil remedy of injunction. Presumably if actual damages are sustained by any person the individual performing the abortion could be subject to civil damages for injuries resulting from performance of an abortion at any state of pregnancy. This would necessarily be dependent upon the facts involved in the matter. In this connection we would note that a licensed physician could also be subject to civil damages for injuries resulting from performance of an abortion as well as any other medical procedure, at any stage of pregnancy if the physician was determined to be negligent and if that negligence was the proximate cause of the injury. A person who is not a licensed physician but who undertakes to perform an abortion contrary to statute conceivably could be held to absolute liability for injuries resulting from the abortion notwithstanding the question of negligence.

5. Section 23-16-14 of the N.D.C.C., as amended, provides:

> "PARTICIPATION IN ABORTION - NOT MANDATORY. - No hospital, physician, nurse, hospital employee, nor any other person, shall be under any duty, by law, or contract, nor shall such hospital or person in any circumstances be required to participate in the performance of an abortion, if such hospital or person objects to such abortion. No such person or institution shall be discriminated against because he or they so object."

The Nyberg case involved a municipal hospital and the Court specifically stated that it was not dealing with a denominational hospital. To the best of our knowledge there is no similar decision which involves a private or governmental hospital.

While there appears to be little question that the above-quoted statute is applicable to all private or denominational hospitals, there is some serious question as to whether the statute would apply to governmental or "public" hospital facilities.

We arrive at this conclusion on the basis that North Dakota is within the Eighth Circuit and the decisions of that Court of Appeals will constitute precedence for U. S. District Courts in North Dakota.

While the decision may have application to governmental, municipal, or "public" hospitals, it however, does not appear to have any application to physicians or hospital employees, and as such, they could rely on the provisions of Section 23-16-14, N.D.C.C.

The Eighth Circuit Court of Appeals in Nyberg v. City of Virginia, 495 Fed. 2d. 1342 (1974) specifically adopted the trial court decision and held that administrators of a "municipal hospital may not arbitrarily preclude abortions from the variety of services offered which require no more expenditure of available facilities and skills." The Court further held that the (municipal) "hospital facilities must be made available for abortion services as they are for other medical procedures to those physicians and their patients who have a right to and request such facilities."

The case involved a hospital regulation as opposed to a state statute and as such, the decision may not be entirely free from doubt.

The basic question may, however, not be considered final in all respects because on a petition for rehearing which was denied enbanc two circuit court judges believed the question of available facilities which will allow abortions should be considered before it is made mandatory for governmental hospital to make available its facilities for nontherapeutic abortions.

On the basis of the expression of the two judges, the further refinement on this question, as well as the question of standing, may have to await future cases or decisions.

The two dissenters to the Nyberg decision on the question of rehearing on page 1348 said "The Court appears to hold that all public hospitals with adequate facilities must permit qualified staff members to perform abortions in such hospitals. They seem to assume that Doe and Roe require this result. We find no such compulsion in those decisions and are reluctant to stand and hold without more careful consideration." The Doe and Roe cases are the cases decided by the U. S. Supreme Court.

The conclusions reached by the Court in the Nyberg case apparently apply only to governmental, municipal or "public" hospitals. Because of the facts involved, we believe that the Court in using the term "public hospital" actually meant a governmental hospital as

distinguished from a private or denominational hospital.

Sincerely yours,

ALLEN I. OLSON

Attorney General