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## Legal Trends in Bioethics

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**Readers who learn of cases, laws, or regulations that they would like reported in this column are encouraged to e-mail Sigrid Fry-Revere at [sfryrevere@cato.org](mailto:sfryrevere@cato.org).**

### GENERAL INTRODUCTION

The laws governing bioethics issues are confusing and sometimes contradictory because of several types of tensions inherent in our legal system. Legislatures and courts work in different time frames and with different priorities. The U.S. constitutional guarantees of separation of church and state and individual rights make bioethics issues involving personal, moral, or religious convictions particularly contentious.

Each state also has its own constitutional protections, some of which clearly mirror those in the federal Constitution and others that don't.

Legislatures and courts play different roles in our constitutional republic. Legislatures are by nature democratic and can react relatively quickly to changes in the political climate. Courts, on the other hand, are inherently anti-democratic. As a matter of fact, their main constitutional function is to protect the rights established by our various constitutions from violation by legislative action. Courts are also inherently conservative in their reaction to events because they are bound by precedents and procedural processes that are designed to assure that major philosophical changes happen gradually.

Legislatures and courts, in the area of bioethics, also act under the existence of two contrary presumptions. Legislatures tend to act with a presumption in favor of prevailing moral beliefs. The courts, on the other hand, have the structural and theoretical obligation to protect individuals from majoritarian decisions that unnecessarily violate their constitutionally protected freedoms. They also have an obligation to uphold the separation of church and state. So, in bioethics cases, courts often have to deal with preventing governments, either through legislation or other state action, from imposing moral or religious preferences on individuals who might not agree. Thus courts tend to show greater deference to individual choice than legislatures do, and tend to become more cautious the more divisive the issue.

An understanding of these inherent tensions between legislative and judicial action and the various individual interests being balanced by the courts will make it easier to understand legal trends in bioethics.

Please note that cases, laws, and regulations listed in earlier columns will not be repeated unless there has been a change in status since the last reporting period. Updates on previously reported cases, laws, and regulations are marked with an asterisk (\*).

## INTRODUCTION TO *JCE* SUMMER 2007

The most significant development reported here actually took place after the January to March reporting period for this issue, but it is nevertheless included, given its importance. The U.S. Supreme Court ruled on *Gonzales v. Carhart* on 18 April 2007. Both the ruling and the dicta in this case will have far-reaching implications in years to come, not only for abortion rights, but for the medical profession as a whole.

The Court's specific ruling was that the federal Partial-Birth Abortion Ban Act of 2003 was constitutional. In so ruling, it held that any law restricting abortion rights would pass constitutional muster as long as it was reasonable. This is a lower standard than the heightened scrutiny standard the Court applied in earlier abortion cases, and it shifts the burden from the government having to prove a law doesn't violate rights to the citizens who feel their rights have been violated. This will make it harder for individuals who believe their rights have been violated to succeed.

In arriving at its ruling, the Court expanded the government's role in regulating the physician-patient relationship. The following are a few quotes from the majority opinion that could be used by legislatures and courts to "second guess" a physician's medical judgment. The opinion states, "There can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" Citing *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997). It is hard to imagine what types of laws and regulations could not be justified on such grounds. The opinion also states, "The State has an interest in ensuring so grave a choice is well informed." It is easy to imagine other grave medical choices in which the State may have an interest. It is reasonable, the Court tells us, for Congress to regulate a procedure that "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world." This could easily be just as true of end-of-life decisions as of those made at the beginning. Finally, we are told, "Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends." This suggests legislatures and courts can restrict the use of medical procedures on moral or other reasonable grounds even if the alternatives are not quite as safe. See "The Rights of Maturing Individuals and Their Parents" below for more detail on the *Carhart* decision.

Another issue that has received considerable attention is whether or not vaccination against the human papillomavirus (HPV) should be mandatory. Most of the bills on this topic have stalled because someone has raised at least one of the following objections: (1) vaccination against a sexually transmitted disease might increase promiscuity, (2) the vaccine has been insufficiently tested, and/or (3) the mandate is being encouraged for political/financial reasons rather than true concern for the health of young women. The motives of some legislators were impugned when it was discovered that Merck, the sole manufacturer with FDA approval to market an HPV vaccine, had not only been actively lobbying to have the vaccine mandated, but that the company had also made campaign contributions to politicians who could be influential in getting such mandates passed. Furthermore, some legislators were clearly supporting a mandate so that the federal government, which helps pay for mandatory childhood vaccines, would pick up at least part of the tab for state vaccination programs.

Other significant developments include an increased effort on the part of legislatures to grapple with how to solve the organ shortage and the ethics of stem-cell research. It is interesting to note how different the approaches can be from state to state.

## THE RIGHTS OF MATURING INDIVIDUALS AND THEIR PARENTS

### PRE-BIRTH (ABORTION, FETUSES, EMBRYOS, AND STEM CELLS)

Abortion is clearly on the minds of U.S. lawmakers and courts. There has been a staggering surge in abortion-related legislation introduced in this legislative session, and at this writing the U.S. Supreme Court has just handed down its ruling in *Gonzales v. Carhart*.

Most of the legislative measures listed below are considered "anti-abortion" measures, but please note that there were almost as many typically called "pro-choice" measures introduced. Many pro-choice mea-

asures aren't listed because they involve funding educational programs and access to medical services for poor women. Such measures are certainly of interest, but, because of sheer volume, this report focuses only on bills that either curtail or increase rights independent of financial ability to pay.

It is worth paying careful attention to the terms used in each of the bills. For example, bills defining personhood at fertilization could, in addition to affecting abortion rights, potentially also lead to the prohibition of certain contraceptives and/or infertility treatments. And bills banning cloning could, in addition to banning cloning for purposes of human reproduction, also ban embryonic stem-cell research involving somatic cell nuclear transfer.

Finally, please note that the abortion debate is waged on several fronts, so also see sections below on "Informed Consent" and "Conscientious Objections" for more abortion-related cases, laws, and regulations.

### Recent Cases, January 2007 - March 2007

**\*Federal.** Although this decision was handed down outside the time frame of the "Legal Trends" for the summer issue of *JCE*, I could not let this column go to press without including the most important abortion decision in decades. On 18 April 2007, the U.S. Supreme Court handed down its ruling in the combined cases of *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood*. They are cited only by the name of the first case. The Court overturned two circuit court decisions and found the Partial-Birth Abortion Ban Act of 2003 constitutional. The federal act in question is now the law of the land. No state can allow Partial-Birth Abortions unless it is to save the life of the woman having the procedure.

*The Federal Act.* The Partial-Birth Abortion Ban Act of 2003 is very specific regarding what type of abortion procedure is prohibited. Not all D&Es are prohibited, only "intact D&Es," also known as "dilation and extraction," "D&X," or "intact D&X." The act is also very specific about the criteria for violations to exist. The *alive* fetus must have been delivered to the point where its entire head is outside the body of the mother, or, in the case of a breech presentation, any part of the fetal trunk past the navel is outside the mother before it is killed by an *overt* act of the healthcare professional doing the abortion. Any procedure in which the fetus has not been delivered to these anatomical benchmarks is not prohibited. Note, since the fetus must be alive when it reaches the indicated anatomical landmarks, an intact D&E in which the fetus is dead before it reaches these landmarks is not prohibited. Further, since the healthcare provider must have the intention of performing an intact D&E, there is no liability if the procedure accidentally becomes an intact D&E. The intention issue is a difficult one, because some procedures are typically followed right from the beginning of the procedure only if an "intact" D&E is intended. The act's language and the Court's interpretation of the act seem to define an "intact" D&E as one that has reached the specified landmarks; however, this leaves open the possibility that there is such a thing as what might be technically an "intact" D&E that is not illegal because the required anatomical benchmarks have not been reached. Finally, it is important to note that the act specifically excludes the abortion recipient of any potential liability under the act. Partial-Birth Abortion Act of 2003, 18 U.S.C. § 1531 (2000 ed., Supp. IV).

*The Court's Majority Opinion.* The federal Partial-Birth Abortion Ban Act of 2003 is constitutional. The decision was 5 to 4. Justice Anthony Kennedy wrote the opinion joined by Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito. The majority opinion found that the act is not void for vagueness, not invalid on its face, and does not impose an undue burden due to overbreadth. This is the first time since *Roe v. Wade* that the Court has upheld a restriction on abortion that does not include an exception for the health of the mother. The major significance of this ruling is the deference it shows legislative action. The opinion states:

We assume the following principles for the purposes of this opinion. Before viability, a State may not prohibit any women from making the ultimate decision to terminate her pregnancy. It also may not impose upon this right an undue burden, which exists if a regulations' purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability. On the

other hand, regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.

...

The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.

...

Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.

...

Considerations of marginal safety, including balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. [Citations and internal quotation marks omitted.]

In addition to a clear deference to legislative action, the majority opinion also shows a lack of deference to individual healthcare providers and their ability to judge what is in the best interest of patients.

*The Court's Dissenting Opinion.* Justice Ruth Bader Ginsburg wrote a dissenting opinion in which Justices John Stevens, David Souter, and Stephen Breyer joined. Those dissenting would have found the act unconstitutional. The opinion criticizes the majority for relying on "rational grounds" for upholding state action when in earlier cases the Court has used the standard of "heightened scrutiny." They also object to the majority's deviation from *Casey*. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). In that case, the Court ruled that "state regulation of access to abortion procedures, even after viability, must protect the health of the woman" (internal quotation marks omitted). The dissenters argue that the majority's deference to the legislature in overriding constitutional rights deteriorates the gains U.S. society has made in recognizing women as protected by that Constitution and as individuals with the full rights of citizenship.

There was a time, not so long ago, when women were regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution. Those views, this Court made clear in *Casey*, are no longer consistent with our understanding of the family, the individual, or the Constitution. Women, it is now acknowledged, have the talent, capacity, and right to participate equally in the economic and social life of the Nation. Their ability to realize their full potential, the Court recognized, is intimately connected to their ability to control their reproductive lives. Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life course, and thus to enjoy equal citizenship stature.

In keeping with this comprehension of the right to reproductive choice, the Court has consistently required that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health. [Citations and internal quotation marks omitted.]

*The As-Applied Challenge.* The majority opinion states the act would be unconstitutional if it exposed women to significant health risks. The Court did not find that a prohibition against intact D&Es created such

a risk, but it did acknowledge that "preenforcement, as-applied challenges to the Act," could be filed as a proper way to protect the health of women should there be "discrete and well defined instances a particular condition has or is likely to occur" where use of intact D&E must be used to protect the health of the mother. While the majority opinion allows for such challenges, it is unclear what such a lawsuit would look like. The dissent asks, "Surely the Court cannot mean that no suit may be brought until a woman's health is immediately jeopardized by the ban on intact D&E." *Gonzales v. Carhart*, 550 U.S. \_\_\_\_ (2007). I'm sure the answer will be forthcoming soon, since lawsuits challenging the act on as-applied basis are undoubtedly already being planned.

**Arizona.** On 23 January 2007, a state court of appeals unanimously upheld a lower court ruling that the state county sheriff's policy of only transporting female inmates to medical facilities for abortions when medically necessary was an unconstitutional burden on the right to an abortion. Defendants are seeking an appeal. *Doe v. Arpaio*, Ariz. S. Ct., 1 CA-CV 05-0835; 2007 Ariz. App., LEXIS 8 (23 Jan. 2007).

**\*California.** A unanimous California Court of Appeals affirmed the lower court's ruling as to the validity of California's Proposition 71. Proposition 71, approved by California ballot initiative during the 2004 general election, provides \$3 billion in funding for stem-cell research over 10 years. *California Family Bioethics Council v. Independent Citizen's Oversight Committee*, Cal. Ct. App., No. A114195, 2/26/07; *People's Advocate v. Independent Citizens Oversight Committee*, Cal. Ct. App., No. A114282, 2/26/07. Plaintiffs are planning to appeal. Tansey, Bernadette, "Court Backs Stem Cell Funding Plan: Research Money From Prop. 71 Still Held Up Pending Appeals," *San Francisco Chronicle*, 22 April 2007; <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/04/22/MNGH9IDLVO1.DTL>, accessed 23 April 2007.

**\*Kansas. Potential action.** State Attorney General Phill Kline has twice tried to file charges against physician George Tiller for allegedly performing 15 illegal late-term abortions in 2003. Each time, the criminal charges were thrown out by Sedgwick County, Kansas, District Judge Paul Clark on jurisdictional grounds, that is, Kline doesn't have authority to file such charges. Kline promises to continue to investigate. Phill Kline lost the Kansas Attorney General race in November 2006 to Democrat Paul Morrison, a vehement supporter of abortion. <http://www.lifesite.net/ldn/2006/nov/06110904.html>, accessed 11 April 2007. See related legislation under Kansas below.

**\*Michigan.** The Michigan Civil Rights Commission issued a declaratory ruling in August 2006 that prescription contraceptives must be covered by employers who provide prescription drug coverage in their health plans. Not to do so is a violation of the Elliott-Larsen Civil Rights Act, which prohibits sex-based discrimination. The ruling allows an exception for nonprofit "religious employers." *Michigan Civil Rights Commission, Declaratory Ruling on Contraceptive Equity*, 21 August 2006 at <http://www.chetlyzarko.com/Declaratory%20Ruling%207-26-06.pdf>, accessed 25 January 2007.

**New Jersey.** A suit was filed in State Superior Court of Essex County against the Metropolitan Medical Associates in Englewood by Rasheedah Dinkins who alleges that clinic physicians provided "negligent, careless and reckless care" because of alleged complications due to the abortion. After the procedure, she felt pains and went to Newark Beth Israel Medical Center where she was unconscious for more than three weeks, had two strokes, and underwent a hysterectomy. *Rasheedah Dinkins v. Metropolitan Medical Associates, Metropolitan Surgical Associates, Inc., Keith Gresham, M.D., Nicholas Kotopoulos, M.D.*, Esx. L-1688-07 (1 March 2007). Based on a complaint filed with the New Jersey Department of Health and Senior Services by Newark Beth Israel Medical Center, the abortion clinic was closed after an inspection revealed several health and record keeping violations that will need to be corrected before the clinic can reopen. R. Padawer, "From Abortion to 4-Week Coma, Case Triggered Probe, Closing of Englewood Clinic," *The Record*, 1 March 2007, pg. A01, accessed 27 April 2007.

### Recent Laws and Regulations, January - March 2007

**Alabama.** Three bills were introduced in the state legislature to restrict abortions. One was introduced that defines personhood beginning at fertilization. A second, also in the state house, criminalizes abortions with the exception of cases where the woman's life is in danger or cases of rape or incest. A third, introduced

in the state senate, would prohibit abortions except for the "extreme case where the pregnancy threatens the life of the mother." H.B. 128, H.B. 329, S.B. 59, 2007 Gen. Assem., Reg. Sess. (Ala. 2007).

A bill was introduced in the state house to prohibit the cloning of human beings. The Regenerative Medicine Enhancement Act would also provide for penalties and civil fines for violations. H.B. 28, 2007 Leg., Reg. Sess. (Ala. 2007).

**Arizona.** A bill was introduced in the state house making appropriations to the Department of Health Services for a regenerative tissue repository and for research in regenerative medicine involving non-embryonic stem-cell research. H.B. 2770, 48th Leg., 1st Reg. Sess. (Ariz. 2007).

**Arkansas.** A bill was introduced in the state house that would protect embryonic stem-cell research, including somatic cell nuclear transfer. The Regenerative Medicine Enhancement Act also bans human reproductive cloning. H.B. 2806, 86th Gen. Assem., Reg. Sess. (Ark. 2007).

**California.** The state assembly passed a bill that involves significant ongoing funding from the California General Fund in the form of grants to umbilical cord blood banks. A.B. 34, 2007-2008 Leg., Reg. Sess. (Cal. 2007).

**Colorado.** Two bills were introduced in the state senate dealing with the personhood status of a fetus. One would make abortions criminal unless necessary to prevent the death of the mother. The other amends the state criminal code to define the fetus as a separate victim apart from its mother in homicide cases. S.B. 143, S.B. 71, 66th Gen. Assem., Reg. Sess. (Colo. 2007).

**Connecticut.** A bill was introduced in the state house to amend the state criminal code to include "unborn person" as a person under the code. H.B. 6067, Gen. Assem., Jan. Sess. (Conn. 2007).

**Delaware.** Two bills were introduced in the state legislature to encourage certain stem-cell research within ethical guidelines. The house bill would allow research on donated embryos under 14 weeks old, ban human reproductive cloning, and establish a committee to develop and adopt guidelines for publicly funded research involving the derivation or use of human embryonic stem cells. The senate bill focuses on banning human reproductive cloning. H.B. 76, S.B. 5, 144th Gen. Assem., Reg. Sess. (Del. 2007).

**Florida.** Two virtually identical bills were introduced in the state legislature to amend the state criminal code to define an "unborn child" as a separate victim from the pregnant woman carrying the child. H.B. 71, S.B. 234, 109th Gen. Assem., Reg. Sess. (Fla. 2007).

Two virtually identical bills were introduced in the state legislature to establish the Stem Cell Research and Ethics Advisory Council. The "Florida Hope Offered through Principled, Ethically Sound Stem Cell Research Act" provides for both a donated funds program and a research grant program from the Biomedical Research Trust Fund. Funding is limited to adult stem cells, amniotic, cord blood, and placental stem cells and does not include embryonic stem cells. H.B. 1065, S.B. 2496, 2007 Leg., Reg. Sess. (Fla. 2007).

Two virtually identical bills were introduced in the state legislature to allow funds from the Biomedical Research Trust Fund to be used on embryonic stem cells. H.B. 555, S.B. 0750, 2007 Leg., Reg. Sess. (Fla. 2007).

**Georgia.** A state house resolution was introduced in the state house to place on the November 2008 ballot an initiative that would define personhood as beginning at fertilization. There is no language in the bill indicating exceptions when an abortion might be permitted. H.R. 536, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

A bill was introduced in the state house that would impose a near total criminal ban on abortion. The bill provides for an exception if a physician makes a medically justified effort to save the lives of both the mother and the fetus and the fetus does not survive. The bill also provides for a penalty of life in prison or the death penalty for both women and doctors found in violation of the law. H.B. 1, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

A bill was introduced in the state senate to establish the Newborn Umbilical Cord Blood Bank to encourage non-embryonic stem-cell research. S.B. 148, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

**Hawaii.** Two virtually identical bills were introduced in the state legislature that would ban partial-birth abortions. H.B. 787, S.B. 129, S.B. 129, H.B. 787, 24th Leg., Reg. Sess. (Haw. 2007). (The bills are no

longer necessary since the U.S. Supreme Court in *Gonzales v. Carhart* upheld the federal ban on partial-birth abortions.)

Two bills were introduced in the state senate to amend the state criminal code to consider the "unborn child" as a separate victim in an assault against a pregnant woman. S.B. 206, S.B. 1903, 24th Leg., Reg. Sess. (Haw. 2007).

Two bills were introduced in the state house that would permit all forms of stem-cell research. The state house version has been referred to committee. The senate version has been deferred until next year's session. H.B. 364, H.B. 1261, 24th Leg., Reg. Sess. (Haw. 2007).

**\*Illinois.** Two bills were introduced in the state house in December 2006: The first would allocate \$25 million annually for the next five years to stem-cell research, including embryonic stem-cell research. The second would ban human cloning and the sale of human embryos. These bills died at the end of the session. H.B. 1039, H.B. 1038, 94th Gen. Assem., Reg. Sess. (Ill. 2006).

A bill was introduced in the state senate that would ban abortions at as early as 12 weeks. There is no exception for protecting the mother's life or health after the 12th week of pregnancy. S.B. 100, 95th Gen. Assem., Reg. Sess. (Ill. 2007).

A bill was introduced in the state house to allow pharmacies to dispense emergency contraceptives to women without a prescription. H.B. 1077, 95th Gen. Assem., Reg. Sess. (Ill. 2007).

**Kansas.** Two bills were introduced in the state legislature to amend the definition of person for purposes of the criminal code to include "unborn child." H.B. 2006, S.B. 2, 82nd Leg., Reg. Sess. (Kan. 2007).

The Kansas House Federal and State Affairs Committee voted to approve a resolution that would force Attorney General Paul Morrison to reinstate the criminal charges against physician George Tiller for allegedly performing illegal late-term abortions. See original legal action reported above. H.R. 6018, 82nd Leg., Reg. Sess. (Kan. 2007).

Five bills were introduced in the state house that relate to stem-cell research. The first would ban somatic cell nuclear transfer. The second would ban the funding of embryonic stem-cell research. The third would ban the creation of chimeras. The fourth encourages non-embryonic stem-cell research by offering a 50 percent tax credit for donations to the adult stem-cell research fund. And the fifth would ban cloning. H.B. 2252, H.B. 2255, H.B. 2403, H.B. 2291, H.B. 2098, 82nd Leg., Reg. Sess. (Kan. 2007).

**Kentucky.** Two abortion-related bills were introduced in the state legislature. A house bill would "ban state constitutional protection for a woman's right to choose." A senate bill would amend existing abortion waiting requirements to require a 24-hour period between when a woman receives state-mandated information and performance of the abortion procedure. H.B. 251, S.B. 179, 2007 Leg., Reg. Sess. (Ky. 2007).

**Massachusetts.** Two bills were introduced in the state legislature to repeal a pre-*Roe v. Wade* criminal ban on abortion. H.B., 173, S.B. 831, 185th Gen. Assem., Reg. Sess. (Mass. 2007).

**\*Michigan.** Four bills were introduced in the state legislature to codify the above described Michigan Civil Rights Commission's declaratory ruling into law. H.B. 4295, H.B. 4296, S.B. 41, S.B. 42, 94th Leg., Reg. Sess. (Mich. 2007).

A bill introduced in the state senate would allow for embryonic stem-cell research by amending the current state code to allow the use of human embryos for non-therapeutic research. S.B. 52, 94th Leg., Reg. Sess. (Mich. 2007).

**Minnesota.** Three bills were introduced in the state legislature to place an initiative on the ballot for November 2008 to amend the state constitutional provision protecting a woman's right to choose an abortion. S.B. 1235, S.B. 1234, H.B. 2378, 85th Gen. Assem., Reg. Sess. (Minn. 2007).

**Mississippi.** A bill was signed into law by the governor that would implement a near total ban on abortions in Mississippi in the event that *Roe v. Wade* is ever overturned by the U.S. Supreme Court. The law would only allow abortions in the case of rape, incest, or to prevent the mother's death. S.B. 2391, 2007 Reg. Sess. (Miss. 2007).

**Missouri.** A bill was introduced in the state house to ban abortions in all cases except when the woman is in danger of death. H.B. 990, 94th Gen. Assem., Reg. Sess. (Mo. 2007).

**Nevada.** A bill was introduced in the state senate to amend the state criminal code to include "unborn

child" as a separate victim apart from the pregnant woman. S.B. 299, 74th Gen. Assem., Reg. Sess. (Nev. 2007).

**New Hampshire.** A bill was introduced in the state house to amend the state homicide code to include "unborn child" as a possible victim. H.B. 177, 160th Gen. Assem., Reg. Sess. (N.H. 2007).

**New York.** Two bills were introduced in the state legislature to amend the criminal code to include "unborn child at any stage of gestation" in the definition of person. S.B. 3117, A.B. 5777, 230th Gen. Assem., Reg. Sess. (N.Y. 2007).

Three bills were introduced in the state legislature that would allow nurses and pharmacists to dispense emergency contraceptives without a prescription. S.B. 3579, S.B. 1940, A.B. 5569, 230th Gen. Assem., Reg. Sess. (N.Y. 2007).

A bill was introduced in the state senate authorizing stem-cell research, requiring informed consent, and prohibiting human reproductive cloning. S.B. 01257, 230th Reg. Sess. (N.Y. 2007).

A bill was introduced in the state senate to create the New York Stem Cell Research Institute. S.B. 02923, 230th Reg. Sess. (N.Y. 2007).

**North Carolina.** Two bills were introduced in the state legislature to amend the criminal code of North Carolina to include "unborn child" as a separate victim than the pregnant woman carrying the child. H.B. 263, S.B. 295, 148th Gen. Assem., 2007 Sess. (N.C. 2007).

A bill was introduced in the state senate that would appropriate \$8 million to the Wake Forest Soldier Regenerative Medicine Institute for stem-cell research. S.B. 715, 148th Gen. Assem., 2007 Sess. (N.C. 2007).

**North Dakota.** A bill was introduced in the state house to impose a total ban on abortions. H.B. 1489, 61st Gen. Assem., Reg. Sess. (N.D. 2007). Another bill was introduced that would impose a similar ban but allows an exception if the woman's life is in danger. H.B. 1466, 61st Gen. Assem., Reg. Sess. (N.D. 2007).

A bill was introduced in the state senate that defines personhood as beginning at fertilization. S.B. 2400, 61st Gen. Assem., Reg. Sess. (N.D. 2007).

A bill was introduced in the state house that bans abortions except if the woman's life is in danger but would only go into effect if *Roe v. Wade* is overturned by the U.S. Supreme Court. H.B. 1466, 61st Gen. Assem., Reg. Sess. (N.D. 2007).

**Oklahoma.** A bill was introduced in the state house that would make the state's pre-*Roe v. Wade* abortion ban enforceable if the case is overturned. In the meantime it would ban all abortions unless the mother's life is in danger. H.B. 1014, 51st Gen. Assem., Reg. Sess. (Okla. 2007).

Two bills were introduced in the state legislature that prohibit the distribution of mifepristone, a medical abortion pill. S.B. 715, H.B. 2181, 51st Gen. Assem., Reg. Sess. (Okla. 2007).

A bill was introduced in the state senate to allow government officials to search offices and medical files of abortion providers without cause, warrant, or announcement. S.B. 617, 51st Gen. Assem., Reg. Sess. (Okla. 2007).

A joint resolution was introduced in the state legislature that would allow researchers to perform any stem-cell research permitted under federal law, but the measure also bans cloning. H.J.R. 1010, 51st Leg., 1st Sess. (Okla. 2007).

**Oregon.** Three bills were introduced in the state house to amend the state criminal code definition of a human being to include "unborn child." H.B. 3272, H.B. 3240, H.B. 2802, 74th Leg. Assem., Reg. Sess. (Or. 2007).

The state house passed a bill amending existing emergency room law to allow dispensing emergency contraceptives to women over 18 without a prescription. H.B. 2154, 74th Leg. Assem., Reg. Sess. (Or. 2007).

A bill was introduced to establish the Human Stem Cell Research Committee and the Human Stem Cell Research Fund. The committee would create guidelines for stem-cell research, while the fund would obtain public and private funds for the purpose of dispensing grants. H.B. 2801, 74th Leg. Assem., Reg. Sess. (Or. 2007).

Two bills were introduced in the state house that would make human cloning a crime. H.B. 2662, H.B.

2929, 74th Leg. Assem., Reg. Sess. (Or. 2007).

**Pennsylvania.** A bill was introduced in the state senate to amend the state criminal code to include "unborn child" as part of the definition of person. S.B. 589, 191st Gen. Assem., Reg. Sess. (Pa. 2007).

**Rhode Island.** Two bills were introduced in the state house to amend the state criminal code to include "unborn child" in the definition of "another." H.B. 5261, H.B. 5234, Gen. Assem., Jan. Sess. (R.I. 2007).

Two bills were introduced in the state legislature that would make the protections under *Roe v. Wade* permanent. S.B. 119, H.B. 5462. Gen. Assem., Jan. Sess. (R.I. 2007).

**South Carolina.** Four bills were introduced in the state legislature defining personhood as beginning at fertilization. H.B. 3284, H.B. 3697, S.B. 313, S.B. 3815, 117th Gen. Assem., 1st Reg. Sess. (S.C. 2007).

Two bills were introduced in the state house that would define person to include "unborn child" under the state's civil and criminal codes. H.B. 3019 (civil), H.B. 3171 (criminal), 117th Gen. Assem., 1st Reg. Sess. (S.C. 2007).

A bill was introduced in the state senate to allow embryonic stem-cell research but banning the buying and selling of pre-implantation embryos. The Biotechnology Act of 2008 would also ban human cloning. S.B. 0173, 117th Gen. Assem., 1st Reg. Sess. (S.C. 2007).

**South Dakota.** A bill passed the state house that would impose a ban on abortions except when the mother's life is in danger or in cases of incest or rape. If enacted by the state senate and signed by the governor, the measure will be automatically included on the 2008 general election ballot. H.B. 1293, 82nd Leg. Sess. (S.D. 2007).

**Texas.** Two bills were introduced in the state legislature that ban abortions unless necessary to prevent a woman from dying. This law would take effect if *Roe v. Wade* is overturned by the Supreme Court. H.B. 175, S.B. 186, 80th Leg. (Tex. 2007).

Five bills and a resolution were introduced in the state legislature relating to stem-cell research. Two identical bills ban human cloning and other uses of human tissue by institutes of higher education, but do not restrict nuclear transplantation to develop therapies. Another also bans cloning more generally. A fourth bill would create a program to provide grants and loans to institutions of higher education and advanced medical research facilities to conduct stem-cell research. And a house bill would establish the Texas Institute of Regenerative Medicine, authorize the issuance of bonds for the purposes of the institute, and prohibit the legislature from prohibiting stem-cell research. H.B. 1829, S.B. 56, H.B. 2704, H.B. 1486, H.B. 537, H.J.R. 43, 80th Leg. (Tex. 2007).

**Utah.** A bill was introduced in the state house to ban all abortions except if the woman's life is in danger, certain limited health circumstances, and if the pregnancy is a result of rape or incest. Law becomes effective if *Roe v. Wade* is overruled. H.B. 235, 57th Leg., Gen. Sess. (Utah 2007).

**Virginia.** A bill was introduced in the state house that would ban abortions except to prevent the death of the mother. The law would go into effect if the U.S. Supreme Court overturns *Roe v. Wade*. H.B. 2124, 2007 Gen. Assem., Reg. Sess. (Va. 2007).

A bill was introduced in the state house that defines personhood as beginning at fertilization. H.B. 2797, 2007 Gen. Assem., Reg. Sess. (Pa. 2007).

Two bills were introduced in the state house that would amend homicide laws to allow fetuses or "unborn children" to be considered victims of a crime separate of the pregnant women who carry them. H.B. 1631, H.B. 2532, 2007 Gen. Assem., Reg. Sess. (Va. 2007).

Five bills were introduced in the state house regarding stem-cell research. Two would allow embryonic stem-cell research within the guidelines established by an oversight committee established by the bills. A third would assure returns on venture capital investments in biotechnology. A fourth provides funding for stem-cell research. And a fifth offers a tax credit for contributions to stem-cell research. H.B. 2857, H.B. 1768, H.B. 1697, H.B. 1939, H.B. 2820, 2007 Gen. Assem., Reg. Sess. (Va. 2007).

**Washington.** Two bills were introduced in the state house relating to stem-cell research. One creates a human stem-cell research advisory committee and establishes funding for stem-cell research. Another would restrict funding to research not involving somatic cell nuclear transfer. H.B. 1163, H.B. 173, 60th Leg., Reg. Sess. (Wash. 2007).

**West Virginia.** Three bills were introduced in the state legislature to ban abortions. One would ban all abortions with no health exception. The other two would ban abortions as early as 12 weeks with no exceptions. H.B. 2036 (general ban), H.B. 3058, S.B. 695 (after 12 weeks), 78th Leg., Reg. Sess. (W. Va. 2007).

A bill was introduced in the state house to include "unborn child" as part of the definition of "human being" for purpose of the state homicide laws. H.B. 2140, 78th Leg., Reg. Sess. (W. Va. 2007).

**Wyoming.** A bill was introduced in the state senate that would amend state homicide laws to include an "unborn child" as a separate victim from the pregnant woman carrying the child. S.B. 118, 59th Leg., Reg. Sess. (Wyo. 2007).

### Interesting Developments in Other Countries

**Mexico.** Lawmakers in Mexico City are considering legalizing abortions within the first three months of pregnancy. Hector Tobar, "Mexico City Lawmakers Begin Hearings on Bill that Would Allow Abortion During First Three Months' Gestation," *Los Angeles Times*, 29 March 2007.

**Rwanda.** Lawmakers are considering a measure that would limit couples to three children. "Rwandan Lawmakers Drafting Measure That would Limit Couples to Three Children, Official Says," *Reuters South Africa*, 15 February 2007.

### AFTER BIRTH (PREMATURE INFANTS, NEWBORNS, AND CHILDREN)

The battle over abortion continues to cause fluctuations in the specific requirements for parental consent and notification laws. It is worth asking whether these debates adequately consider the best interests of the young women affected. More than half of the U.S. states require parental consent before a minor can get a tattoo or a body piercing. In some of those states, no such consent is required for an abortion. Is there, or can there be, any consistent criteria for determining when a minor is old enough to make decisions on his or her own? Should the seriousness, the inherent health risk, or the permanence of the decision play a role in determining whether notice or consent is required? If yes, then do these factors make notice and consent requirements more or less reasonable?

### Recent Cases, January 2007 - March 2007

\***Illinois.** The Illinois Supreme Court issued rules necessary to implement the state Parental Notice of Abortion Act. Ill. S. Ct. M.R. 21173 in January. But the act still remains unenforceable. The state's attorney general has filed a motion to have those rules put in place, but the matter is still pending.

\***Missouri.** Case pending. In *Planned Parenthood of Kansas and Mid-Missouri, Inc., et al. v. Jeremiah W. (Jay) Nixon, et al.*, the Missouri Supreme Court heard arguments challenging the Missouri parental consent law that gives parents and prosecutors the right to sue adults who help minors get an abortion without complying with state parental consent laws, which require either direct parental consent or court approval. The challenge is based on whether the "aid and assist" language in the law includes speech, and therefore is a violation of state-protected right to free speech. The case was heard 15 November 2006. A decision is expected at some point before the end of the summer. *Planned Parenthood of Kansas and Mid-Missouri, Inc., et al. v. Jeremiah W. (Jay) Nixon, et al.*, No. SC87321 (Motion filed 13 November 2006).

### Recent Laws and Regulations, January - March 2007

**Connecticut.** A bill was introduced in the state house that mandates parental notice prior to a minor obtaining an abortion. H.B. 5807, Gen. Assem., Jan. Sess. (Conn. 2007).

**Georgia.** A bill was introduced in the state house that would require parental notice before minors could receive contraception. H.B. 526, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

**Hawaii.** Three bills were introduced in the state legislature requiring parental notice, and one requiring parental consent before a minor can obtain an abortion. H.B. 786, S.B. 1904, S.B. 205, H.B. 788, 24th Leg.,

Reg. Sess. (Haw. 2007).

**Missouri.** A bill was introduced in the state house to require parental consent for access to contraceptives. H.B. 617, 94th Gen. Assem., Reg. Sess. (Mo. 2007).

**New Hampshire.** A bill passed the state house and is now before the state senate to repeal existing parental notification laws. H.B. 184, 160th Gen. Assem., Reg. Sess. (N.H. 2007).

**New York.** Two abortion consent-related bills were introduced in the state assembly. One would require parental notice and the other parental consent prior to a minor receiving an abortion. A.B. 2560, A.B. 3217, 2007-2008 Gen. Assem., Reg. Sess. (N.Y. 2007).

**North Carolina.** Two abortion consent-related bills were introduced in the state legislature. The house bill would require parental notice when minors were granted access to contraceptives. The senate bill would require that parental consent to an abortion be either personally signed or notarized. H.B. 103, S.B. 481, 148th Gen. Assem., Reg. Sess. (N.C. 2007).

**Oregon.** A bill was introduced in the state house to require parental notice prior to a minor receiving an abortion. H.B. 3234, 74th Gen. Assem., Reg. Sess. (Ore. 2007).

**Tennessee.** Two bills were introduced in the state legislature to require parental notification when a minor seeks an abortion. H.B. 1441, S.B. 1795, 105th Gen. Assem., Reg. Sess. (Tenn. 2007).

**Vermont.** A bill was introduced in the state house to mandate parental notice before a minor receives an abortion. H.B. 473, 69th Leg., Reg. Sess. (Vt. 2007).

**Washington.** A bill was introduced in the state house that would mandate parental notice before a minor could receive an abortion. H.B. 1321, 60th Leg., Reg. Sess. (Wash. 2007).

**West Virginia.** Seven bills were introduced to modify parental notice laws. Two eliminate the option that parental notice can be given by phone and increase the waiting period between notice and the abortion procedure to 48 hours. A third requires that parental notice be notarized. A fourth requires written parental consent. A fifth allows a physician bypass provision but requires 48 hours notice. And two eliminate the physician bypass option and modify the time in which a judge must rule if a minor seeks waiver of the notice requirement — one lengthens the period from 24 hours to three days, the other lengthens the period to five days. H.B. 3128, S.B. 544 (48 hour prior notice; no phone notice); H.B. 3187 (notarized parental notice); H.B. 2219 (written parental consent); H.B. 2037 (allows a physician bypass 48 hour notice); H.B. 2151 (3 days), S.B. 72 (5 days), 2416 78th Leg., Reg. Sess. (W. Va. 2007).

## VACCINES

Mandatory childhood vaccine is one of those issues in which the rights of parents and the state sometimes collide. There is a growing general mistrust of both pharmaceutical companies and the government, leading some parents to question their motives when issues involving mandatory childhood vaccine are raised. Some parents object on religious grounds, some on moral grounds, some because they see the specific vaccination program under discussion as a waste of money, some because they believe the drug hasn't been tested enough, and others because they simply feel it is their prerogative as parents to decide. All these issues are being raised with respect to mandating the HPV vaccine, and many legislators who originally rushed to introduce bills to mandate the vaccine are now having second thoughts.

### Recent Laws and Regulations, January - March 2007

**Federal.** The Centers for Disease Control and Prevention (CDC) adopted the recommendation of its Advisory Committee on Immunization Practices to routinely give the human papillomavirus (HPV) vaccine to girls/women between the ages of nine and 26. John Abramson, the chair of this committee, has stated publicly that he does not support mandating the vaccine. See <http://www.cdc.gov/mmwr/preview/mmwr.html/rr56e312a1.htm>, accessed 27 April 2007; Gregory Lopes, "CDC Doctor Opposes Law for Vaccine," *Washington Times*, 27 February 2007, <http://www.washtimes.com/business/20070226-115014-2031r.htm>, accessed 27 April 2007.

In the U.S. House of Representatives a bill was introduced that would prohibit federal funds to be used by states who make the HPV vaccine mandatory. H.R. 1153, 110th Cong. (1st Sess. 2007).

**Arkansas.** On 26 March a state senate committee voted down a bill that would have restricted the amount of mercury allowed in vaccines. S.B. 911, 86th Gen. Assem., Reg. Sess. (Ark 2007).

**California.** A bill was introduced in the state assembly that would require all girls entering the sixth grade to receive the HPV vaccine. The bill includes an opt-out provision. A.B. 16, 2007-2008 Leg., Reg. Sess. (Cal. 2007).

**Colorado.** The state house committee approved a bill that would require middle school girls to receive the HPV vaccine. The bill includes an opt-out provision and requires health insurers to cover the cost of HPV vaccines. H.B. 1301, 66th Gen. Assem., 1st Reg. Sess. (Colo. 2007).

**Connecticut.** Three HPV-related bills were introduced in the state legislature. One would require all 12-year-old girls to be vaccinated. A second would require the state's insurance program to cover HPV vaccines for low-income families. And a third would require the health department to develop HPV immunization standards. H.B. 6085, H.B. 5485, S.B. 86, 2007 Gen. Assem., Jan. Sess. (Conn. 2007).

**District of Columbia.** The city council voted to preliminarily approve a bill that would require girls entering the sixth grade to receive the HPV vaccine. The provision has an opt-out provision. B17-0030, 17th Council Period (D.C. 2007).

**Florida.** A bill was introduced in the state house to require all girls entering the sixth grade to receive the HPV vaccine. There is an opt-out provision. H.B. 561, 2007 Leg., Reg. Sess. (Fla. 2007).

**Georgia.** A bill was introduced in the state house to require all girls entering the sixth grade to receive the HPV vaccine. There is an opt-out provision. 2007. S.B. 155, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

**Indiana.** A bill was signed by the governor on 26 March 2007 that requires school systems to report the number of girls who have received the HPV vaccine. S.B. 327, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2007).

**Kansas.** A bill was introduced in the state house that would require all girls entering the sixth grade in the state's public schools to receive an HPV vaccine. The bill includes an opt-out provision. H.B. 2227, 82nd Leg., Reg. Sess. (Kan. 2007).

**Kentucky.** The state house passed a bill that would require middle school girls to receive the HPV vaccine. The bill includes an opt-out provision. H.B. 345, 2007 Leg., Reg. Sess. (Ky. 2007).

**Maryland.** A bill was signed by the governor that would establish a HPV vaccine subcommittee in the Cervical Cancer Committee of the Maryland Comprehensive Cancer Control Plan; provide for the membership and duties of the HPV vaccine subcommittee; and require the HPV vaccine subcommittee to submit an annual report to the Cervical Cancer Committee by 1 September 2007. H.B. 1049, 2007 Gen. Assem., 423rd Sess. (Md. 2007).

**Massachusetts.** The governor announced a plan that would make the HPV vaccine both optional and fully funded by the state as part of this year's budget proposal; <http://www.medicalnewstoday.com/medicalnews.php?newsid=64304>, accessed 27 April 2007.

**Michigan.** Two bills were introduced in the state house dealing with HPV vaccines. One would require parents to provide school officials with a statement from a physician indicating whether or not a sixth grade girl has received an HPV vaccine. The other would mandate the vaccine, but also includes an opt-out provision. H.B. 4164, H.B. 4140, 94th Leg., Reg. Sess. (Mich. 2007).

**Minnesota.** Lawmakers in both chambers introduced bills to mandate the HPV vaccine for all girls ages 12 and older. Both bills have opt-out provisions. H.B. 530, S.B. 243, 85th Leg., Reg. Sess. (Minn. 2007).

**Nevada.** A bill was introduced in the state senate that would require insurance companies to cover the cost of HPV vaccinations. S.B. 409, 74th Gen. Assem., Reg. Sess. (Nev. 2007).

**New Mexico.** A bill was passed by the state legislature that would require all girls entering the sixth grade to receive an HPV vaccine, but the bill was "pocket vetoed" by Governor Richardson on 17 March 2007. S.B. 1174, 48th Leg., 1st Sess. (N.M. 2007).

**New York.** A bill was introduced in the state senate that would require the HPV vaccine for females born after 1 January 1996. The bill includes an opt-out provision. S.B. 4394, 2007 Leg., 230th Reg. Sess. (N.Y. 2007).

**Ohio.** A bill was introduced in the state house that would require girls entering sixth grade to be vaccinated against HPV. The bill has an opt-out provision. H.B. 81, 127th Gen. Assem., Reg. Sess. (Ohio 2007).

**South Dakota.** The governor signed into law a bill that provides \$9.2 million to voluntarily vaccinate at no cost to South Dakota's females between the ages of 11 and 18. H.B. 1061, 82nd Leg. Sess. (S.D. 2007); act of 26 March 2007, ch. 201, 2007 S.D. Laws (to offer an HPV vaccine initiative, transfer funds, and declare an emergency).

**Texas.** The governor mandated by executive order that all girls entering the sixth grade receive the HPV vaccine, but that order is being challenged by the legislature and the Texas Attorney General. Tex. Exec. Order RP65, 2 February, <http://www.governor.state.tx.us/divisions/press/exorders/rp65>, accessed 27 April 2007.

**Vermont.** A bill was introduced in the state house that would require girls entering the sixth grade to be vaccinated against HPV. The bill does include an opt-out provision. H.B. 256, 69th Leg., 2007 Sess. (Vt. 2007).

**Virginia.** The governor signed into law a bill requiring all sixth grade girls to be vaccinated against HPV. The bill includes an opt-out provision. The bill was chaptered on 11 April 2007. H.B. 2035, 2007 Gen. Assem., Reg. Sess. (Va. 2007).

## INFORMED CONSENT

There have been many questions of late regarding the risks and benefits of vaccines and whether certain vaccines should be mandated, or if just the information parents need to make an informed choice should be mandated. Those vaccine-related laws are reported here, but abortion-related laws dominate the informed consent section of this issue of "Legal Trends." Since the Supreme Court's decision in *Carhart*, a proliferation of state laws governing the informed consent process can be expected. States have required specific disclosures during the informed consent process before, but I predict that they will rely on *Carhart* to greatly increase their interventions in the physician-patient relationship, particularly where abortions and end of life decisions are concerned.

### Recent Cases, January 2007 - March 2007

**Eighth Circuit Court of Appeals.** In *Planned Parenthood Minn. v. Rounds*, the court of appeals (Minnesota, Nebraska, North Dakota, South Dakota, Eastern and Western Districts of Arkansas, Northern and Southern Districts of Iowa, Eastern and Western District of Missouri) enjoined the implementation of amendments to an **Ohio** state abortion law requiring that special informed consent provisions be met unless the abortion is necessary due to medical emergency. The special provisions in question require abortion providers to notify patients that "the abortion will terminate the life of a whole, separate, unique, living human being" and to certify that the pregnant woman has read, and that the physician believes her to understand, the information imparted. Plaintiffs sought the injunction, claiming the law compelled providers to articulate the state's abortion ideology and philosophy in violation of the First and Fourteenth Amendments. The injunction prevents enforcement of the law while it is adjudicated. The court simultaneously enjoined a similar **South Dakota** law. 467 F.3d 716; 2006 U.S. App. LEXIS 26914 (30 October 2006). The 8th U.S. Circuit Court of Appeals agreed to hear the case on 11 April 2007.

\***Louisiana.** In *Brown v. Louisiana*, *State of*, the Louisiana Court of Appeals reversed and remanded a trial court's summary judgment. The court found that a failure to inform a patient of more conservative medical approaches to a hysterectomy could be a violation of informed consent, justifying damages for negligence. The issue needs to go to a jury and cannot be decided by summary judgment. The case was returned to the district court for jury selection and awarding of damages. A hearing is scheduled for 29 June

2007. No. 06-709 (La. Ct. App. 2 November 2006).

**\*Texas.** In *Gray v. Woodville Health Care Center*, the Court of Appeals of Texas, Eighth District, held that a family didn't have a case for malpractice or wrongful death. The court did not discuss informed consent or the meaning of "hospice" care, but analyzed the case purely along traditional notions of malpractice. The facts, however, clearly indicated a misunderstanding as to the meaning of "hospice" care. The family consented to having the patient transferred to hospice, but was shocked to find that the patient died the day after transfer; in their minds it was negligent for the patient's physician to order most treatments stopped in conjunction with the transfer. 2006 Tex. App. LEXIS 6904 (3 August 2006). Petition for review was denied by *Gray v. Evans*. 2007 Tex. LEXIS 18 (5 January 2007).

A lawsuit was filed alleging that Governor Rick Perry violated state law by exceeding his authority when he mandated that Texas sixth graders be vaccinated against the HPV vaccine. *John and Jane Does I-3 v. Rick Perry*, 1d. No. 07-000-553 (Travis County, Texas; filed 22 February 2007).

### Recent Laws and Regulations, January - March 2007

**Connecticut.** Three abortion-related bills were introduced in the state legislature. A house bill would require that prior to the performance of an abortion, a physician or counselor must provide the woman seeking an abortion with an ultrasound photograph of the fetus for the purpose of helping women make informed decisions about abortion. Two senate bills would assure that sexual assault victims receive information about and access to emergency contraception. H.B. 6108, S.B. 1343, S.B. 685, Gen. Assem., Jan. Sess. (Conn. 2007).

**Florida.** Two virtually identical bills were introduced in the state legislature to assure that sexual assault victims receive information about and access to emergency contraception. H.B. 1191, S.B. 1156, 109th Gen. Assem., Reg. Sess. (Fla. 2007).

**Georgia.** A bill passed the state house that would require every woman seeking an abortion to undergo and review an ultrasound of her fetus before an abortion may be performed. After passing, it was sent to the senate, which made the ultrasound or sonogram voluntary; however, the physician must either offer to perform one or provide the patient with a list of providers, facilities, and clinics that can perform the procedure. The senate is insisting upon its version, which the house is now considering. 147, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

**Hawaii.** Four bills were introduced in the state legislature to assure that victims of sexual assault receive information and access to emergency contraceptives. H.B. 762, H.B. 466, S.B. 1110, H.B. 1067, 24th Leg., Reg. Sess. (Haw. 2007).

**Indiana.** Two bills were introduced in the state senate to amend the language of current abortion informed consent requirements. Both laws also require an 18-hour mandatory waiting period between the time when the woman receives such information and the actual abortion procedure. S.B. 172, S.B. 135, 115th Gen. Assem., Reg. Sess. (Ind. 2007).

**Kentucky.** A bill requiring physicians to provide a patient with information pertaining to fetal pain at various stages of an abortion procedure passed the state senate on 1 March 2007 and has been delivered to the House Committee on Health and Welfare. Specifically, the bill would require physicians to administer anesthetic to a fetus of 20 weeks gestational age or older prior to performing an abortion and include fetal pain information as part of the informed consent process. Under the bill, any violation of these requirements is a Class D felony. S.B. 80, 2007 Leg., Reg. Sess. (Ky. 2007).

**Maine.** A bill was introduced in the state legislature to increase awareness about cervical cancer and the HPV vaccine. L.D. 137, 123rd Leg., Reg. Sess. (Me. 2007).

**Massachusetts.** A bill was introduced in the state house to amend existing pre-abortion requirements to require a 24-hour period between when a woman receives state-mandated information and performance of the abortion procedure. H.B. 1687, Gen. Assem., Reg. Sess. (Mass. 2007).

**Minnesota.** Two bills were introduced in the state legislature that would assure that sexual assault victims receive information and have access to emergency contraceptives. S.B. 1266, H.B. 1442, 85th Gen.

Assem., Reg. Sess. (Minn. 2007).

**Missouri.** A bill was introduced in the state house that would require women to view an ultrasound as part of the informed consent process prior to an abortion. H.B. 1225, 94th Gen. Assem., Reg. Sess. (Mo. 2007).

**New Hampshire.** A bill was introduced in the state house that requires specific content for informed consent disclosure prior to an abortion and a 24-hour waiting period between when the woman receives such information and the procedure. H.B. 744, 160th Gen. Assem., Reg. Sess. (N.H. 2007).

**New York.** A bill was introduced in the state assembly to create provisions for advance directives concerning the disposition of cryopreserved embryos and gametes. A.B. 2531, 2007 Leg., 230th Reg. Sess. (N.Y. 2007).

A bill was introduced in the state assembly that requires specific informed consent and a 20-hour waiting period between when a woman receives the required information and the abortion procedure. A.B. 5720, 230th Gen. Assem., Reg. Sess. (N.Y. 2007).

**North Carolina.** The state senate passed a bill that requires school officials to provide the parents and guardians of children in grades five through 12 information about the HPV vaccine. S.B. 260, 148th Gen. Assem., 2007 Sess. (N.C. 2007).

Two bills were introduced in the state legislature to assure that victims of sexual assault receive information and access to emergency contraception. H.B. 961, S.B. 968, 148th Gen. Assem., 2007 Sess. (N.C. 2007).

**Oklahoma.** A bill was introduced in the state senate that would assure that victims of sexual assault receive information and access to emergency contraceptives. S.B. 105, 51st Gen. Assem., Reg. Sess. (Okla. 2007).

**Oregon.** A bill was introduced in the state house that dictates the content of informed consent and requires that there be a 24-hour waiting period between when information is disclosed and an abortion procedure. H.B. 3415, 74th Leg. Assem., Reg. Sess. (Or. 2007).

**Pennsylvania.** Two bills were introduced in the state legislature to assure that victims of sexual assault receive information about and access to emergency contraceptives. H.B. 288, S.B. 730, 191st Gen. Assem., Reg. Sess. (Pa. 2007).

**Rhode Island.** Two bills were introduced in the state legislature that would require specific information to be disclosed during the informed consent process and a 24-hour waiting period between such disclosure and the abortion procedure. H.B. 5849, S.B. 472, Gen. Assem., Jan. Sess. (R.I. 2007).

**South Carolina.** A bill was introduced in the state house requiring a 24-hour waiting period between required informed consent disclosure and the abortion procedure. H.B. 3766, 117th Gen. Assem., 1st Reg. Sess. (S.C. 2007).

Another pair of bills was introduced that would require women who are seeking abortions to view an ultrasound of their baby as part of the informed consent process. S.B. 84, H.B. 3355, 117th Gen. Assem., 1st Reg. Sess. (S.C. 2007).

**South Dakota.** A bill passed the state senate that allows a healthcare facility to refrain from providing emergency contraception or even information about emergency contraception. S.B. 187, 82nd Leg. Sess. (S.D. 2007).

**Tennessee.** Two bills were introduced in the state legislature to ensure that sexual assault victims receive information about emergency contraceptives, but the bill does not require the provision of emergency contraceptives, and it includes exemptions from the rule for certain hospitals. H.B. 1989, S.B. 2073, 105th Gen. Assem., Reg. Sess. (Tenn. 2007).

**Texas.** A bill was introduced in the state senate that requires doctors to tell women seeking an abortion that the state will pay them \$500 if they choose to put their child up for adoption instead of having an abortion. S.B. 1567, 80th Leg. (Tex. 2007).

A bill was introduced in the state house to ensure that sexual assault victims receive information and access to emergency contraceptives. H.B. 2161, 80th Leg. (Tex. 2007).

**Virginia.** A bill was introduced in the state house that requires specific disclosure as part of informed

consent and a 24-hour waiting period between disclosure and an abortion procedure. H.B. 2301, 2007 Gen. Assem., Reg. Sess. (Va. 2007).

A bill passed the state house that requires all women considering an abortion to undergo an ultrasound. H.B. 2808, 2007 Gen. Assem., Reg. Sess. (Va. 2007).

**West Virginia.** A bill was introduced in the state house to modify existing informed consent requirements and require a 24-hour waiting period between disclosure and an abortion procedure. H.B. 2439, 78th Leg., Reg. Sess. (W. Va. 2007).

A bill was introduced in the state house that requires all women seeking an abortion to undergo an ultrasound procedure, whether medically indicated or not. H.B. 2031, 78th Leg., Reg. Sess. (W. Va. 2007).

A bill was introduced in the state house to assure that sexual assault victims receive information and have access to emergency contraceptives. H.B. 2134, 78th Leg., Reg. Sess. (W. Va. 2007).

**Wyoming.** A bill was introduced in the state house that would require specific informed consent and a 24-hour waiting period between disclosure and an abortion procedure. H.B. 144, 59th Leg., Reg. Sess. (Wyo. 2007).

## ORGAN AND TISSUE PROCUREMENT

### Recent Cases, January 2007 – March 2007

\***Federal. Ongoing case.** The Eighth U.S. Circuit Court of Appeals (Minnesota, Nebraska, North Dakota, South Dakota, Eastern and Western Districts of Arkansas, Northern and Southern Districts of Iowa, Eastern and Western District of Missouri) in *Wash. U. v. Catalona* is reviewing the lower court's ruling that Washington University in St. Louis owned the tissue samples that William J. Catalona, MD, had collected for prostate cancer research while at the university. The U.S. District Court for the Eastern District of Missouri held that the informed consent documents signed by Catalona's patients, which specifically gave the doctor the patients' tissue samples and included the patients' right to withdraw from the study and request that their tissue samples be destroyed, were "inconsequential" in its decision to grant full property rights to the university. Appeal No. 06-2286 (8th Cir. 15 May 2006). The case was argued 13 December 2006. A decision should be forthcoming shortly. Appeal No. 06-2286 (8th Cir. 13 December 2006).

**California.** San Luis Obispo police and the Medical Board of California are investigating a transplant surgeon for allegedly hastening the death of a patient in order to harvest his organs more quickly. Hootan Roozrokh, MD, is being investigated for violating a California law that prohibits transplant surgeons from directing the care of potential donors while the patient is still in treatment. Roozrokh allegedly directed the administration of "excessive" doses of pain medication while the potential organ donor was still in the operating room. The case was referred to the San Luis Obispo District Attorney and it is currently under review; as yet, no formal charges have been filed.

\***Massachusetts. Ongoing case.** In *Gonzales et al. v. Katz et al.*, a probable case of first impression, an organ bank is being sued because the recipient of an organ contracted a rare form of cancer, allegedly from the organ supplied by the bank. Both the recipient and the donor died of the same rare form of cancer. In this part of the case, the court refused to dismiss the case on grounds that the good faith immunity provision of the Massachusetts Promotion of Anatomical Science Act did not apply in this case. The act does not apply to the clinical process by which the medical suitability of organs is determined but rather to those authorizing and receiving anatomical gifts. 21 Mass. L. Rep. 351; 2006 Mass. Super. LEXIS 358 (Mass. Super. Ct. 19 July 2006). A hearing was held on 11 April 2007 to refine the issues to be addressed. The firm representing the plaintiff is in the process of issuing depositions. A hearing is expected later this summer.

### Recent Laws and Regulations, January - March 2007

**Federal.** The Charlie Norwood Living Organ Donation Act, which clarifies that "paired donations" do not violate the National Organ Procurement Act's prohibition against receiving "valuable consideration" for

organs, passed in the U.S. House and was placed on the Senate Legislative Calendar on 14 March 2007. H.R. 710, S. 487, 110th Cong. (1st Sess. 2007).

The Centers for Medicare and Medicaid Services (CMS) announced on 22 March 2007 new rules that would withhold Medicare funding from transplant programs that were "poor or marginal performers." These regulations will be effective as of 28 June 2007. 42 *CFR* Parts 405, 482, 488, and 498.

The United Network for Organ Sharing (UNOS) is drafting a proposal to maximize the number of years of life gained from donated kidneys by favoring younger recipients over older ones. Once finalized, this proposal would need to be approved by the Department of Health and Human Services (DHHS). Meckler, Laura, "Donor Organs May Go to Youngest On Wait List," *Associated Press*, 10 March 2007.

**Arkansas.** On 29 March 2007 the governor signed into law the 2006 Revised Uniform Anatomical Gift Act. Ark. Stat. tit. 12, §§ 12-325 (2007).

**Idaho.** On 23 February 2007 the governor signed into law the 2006 Revised Uniform Anatomical Gift Act. Idaho. Stat. tit. 39, § 3703 (2007).

**Iowa.** On 5 April 2007 the governor signed into law the 2006 Revised Uniform Anatomical Gift Act. Iowa Stat. tit. 4, § 142(c).

**\*New Jersey.** A bill passed the state legislature that would require the New Jersey Motor Vehicle Commission to share organ donor information with federally designated organ procurement organizations. The governor has indicated that he will sign the bill. S.B. 1760, 211th Leg., Reg. Sess. (N.J. 2006)

Also in New Jersey, a bill was withdrawn from further consideration that would have amended the New Jersey Anatomical Gift Act to require that those involved in organ procurement not ask for an anatomical gift if they have reason to believe that the gift would be contrary to the decedent's wishes or religious beliefs. The amendment further would have barred the anatomical gift if a person who is listed in the state list of potential surrogates indicates that such a gift would be contrary to the decedent's wishes or religious beliefs. S.B. 2378, 211th Leg., Reg. Sess. (N.J. 2007)

**New Mexico.** On 3 April 2007 the 2006 Revised *Uniform Anatomical Gift Act* became law. N.M. Stat. tit. 7, § 7242 (2007).

**North Dakota.** On 9 April 2007 the governor signed into law the 2006 Revised Uniform Anatomical Gift Act. N.D. Stat. tit. 23, § 0601 (2007).

**\*South Carolina.** A bill was introduced in the state senate that would require all patients to indicate, at the time of admission to a hospital, whether or not they are an organ or tissue donor, or both, and, if not, whether the patient or the patient's family would be willing to discuss organ or tissue donation, or both, should the patient become a potential donor during his or her stay in the hospital. The bill was referred to the Committee on Medical Affairs on 9 January 2007. S.B. 131, 117th Gen. Assem., Reg. Sess. (S.C. 2007).

A bill was introduced in the state senate that would allow prison inmates to donate organs and bone marrow in exchange for commuted sentences. S.B. 417, 117th Gen. Assem., Reg. Sess. (S.C. 2007).

**South Dakota.** On 26 March 2007 the governor signed into law the 2006 Revised Uniform Anatomical Gift Act. S.D. Stat. tit. 34, § 2640 (2007).

**Utah.** On 7 March 2007 the governor signed into law the 2006 Revised Uniform Anatomical Gift Act. Utah. Stat. tit. 26, § 2800 (2007).

**Virginia.** On 11 April 2007 the governor signed into law the 2006 Revised Uniform Anatomical Gift Act. Vir. Stat. tit. 32, §§ 1-290.

## UNCONVENTIONAL TREATMENT

### Recent Cases, January 2007 - March 2007

**Federal.** On 21 February 2007 a suit was filed by the Americans for Safe Access against the DHHS and the U.S. Food and Drug Administration (FDA) in an Oakland California federal district court for allegedly violating the federal Administrative Procedure Act by publicly releasing "false and misleading statements" about the benefits of the use of medical marijuana. The suit is calling for the DHHS and the FDA to retract

and correct statements that there are no sound scientific studies supporting the medical use of marijuana. The government's response is due 25 May 2007. *Americans for Safe Access v. Department of Health and Human Services and Food and Drug Administration*, No. 007-01049 (C.D. Ca., Filed 21 February 2007).

### Recent Laws and Regulations, January - March 2007

**Federal.** The FDA is considering regulations to expand its current Compassionate-Use Programs that make experimental drugs available to individuals or groups under certain circumstances. The rules make drugs available during all stages of development, including during Phase I testing, and allow manufacturers to charge the cost of making and providing the drugs, but not to make a profit. Such regulations would allow patients to use drugs before safety trials have been completed (Phase I) and before testing for efficacy has even begun (Phase II). "Expanded Access to Investigational Drugs for Treatment Use," 71 *Fed. Reg.* 75147 (14 December 2006).

**Rhode Island.** The state legislature is considering a bill that will permanently legalize medical marijuana use in the state. Such use was already legal under a law passed in January 2006, but that law was set to expire on 30 June 2007 unless the legislature acted. H.B. 6005, Gen. Assem., Jan. Sess. (R.I. 2007).

**Washington.** A bill received its first reading in the Health Care and Wellness Committee on 18 January 2007 that requires the state department of health to determine the quantity of marijuana that could be considered a reasonable 60-day supply. The existing law, Initiative 692, passed with 59 percent voter approval in 1998. It allows doctors to recommend but not prescribe marijuana for people suffering from intractable pain, but only allows a 60-day supply to be possessed by any individual at one time. This bill is intended to create a clear line for law enforcement and individual patients. The bill is currently back in the senate to be voted on as amended by the house. H.B. 1395, 60th Leg., Reg. Sess. (Wash. 2007).

### LIFE-AND-DEATH DECISIONS

Two major developments stand out in this area of the law for this quarter. The first is that several states have adopted, or are considering adopting, the new Uniform Anatomical Gift Act. Those new laws are reported under the "Organ and Tissue Procurement" section of this column. The other development is electronic registries for advance directives. Those laws, and some others of interest, are reported here.

### Recent Cases, January 2007 – March 2007

**Florida.** On 20 March 2007, a Palm Beach County jury awarded \$150,000 in damages to the family of a patient who was kept alive by artificial means contrary to the wishes expressed in her advance directive. *Linda Scheible, as Personal Representative of the Estate of Madeline Neumann, deceased v. The Joseph L. Morse Geriatric Center, Inc., Jaimy H. Bensimon, M.D.*, 21569 F. Supp. 919 (Fla. 2007).

**\*New York.** In *In re Guardianship of Chantel Nicole R*, the Supreme Court of New York, Appellate Division, First Department ruled that the Mental Hygiene Legal Service (MHLS) had the authority to commence a special proceeding to object to a mother of a mentally retarded child making medical decisions for her daughter concerning life-sustaining treatment. 821 N.Y.S.2d 194; 2006 N.Y. App. Div. LEXIS 10922 (21 September 2006). An appeal was dismissed without costs, by the court *sua sponte*, upon the grounds that no substantial constitutional question is directly involved. 8 N.Y.3d 840; 862 N.E. 2d 784; 2007 N.Y. LEXIS 107 (16 January 2007).

### Recent Laws and Regulations, January - March 2007

**California.** A bill was introduced in the state assembly called the California Compassionate Choice Act. A.B. 374, 2007-2008 Leg., Reg. Sess. (Cal. 2007). The act would allow adults to request that medication be prescribed to provide comfort and to assure a peaceful death if suffering becomes unbearable. The act would

also establish procedures by which to implement such requests.

**\*Georgia.** A bill passed in the state house that revises Georgia's advance directive laws. Among other things, the bill combines Georgia's living will and durable power of attorney provisions into one form. The state senate added an amendment providing for the creation of a web site for the purpose of providing consumers information on the cost and quality of healthcare in Georgia. The senate passed an amended version of the bill. The senate version will still have to be approved by the house or some other compromise will be needed before this piece of legislation can be sent to the governor for signature. H.B. 24, H.B. 24/SCSFA/1, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

**Hawaii.** A bill was introduced in the state house to allow aid in dying. It is stuck in committee and can no longer come to a vote this legislative session. H.B. 675, 24th Leg., Reg. Sess. (Haw. 2007).

**Kansas.** A bill was introduced in the state assembly that creates a presumption that all state residents would want artificial nutrition and hydration even if there are known desires to the contrary, unless there is clear and convincing evidence of an express, informed wish to withdraw nutrition and hydration in the "applicable circumstances." A.B. 2176, 82nd Leg., Reg. Sess. (Kan. 2007).

**New Hampshire.** A bill was introduced in the state house that prohibits lifesaving treatment from being withdrawn from developmentally disabled persons or persons who once were mentally competent but have lost that competency. Life-sustaining treatment could not be withdrawn even if the patient had previously indicated such wishes while competent. H.B. 244, 160th Gen. Court, Reg. Sess. (N.H. 2007).

A bill was introduced to require the original copy of an advance directive for it to be followed. H.B. 244, 160th Gen. Court, Reg. Sess. (N.H. 2007).

**\*New Jersey.** Two virtually identical bills were introduced in the state legislature that would require surrogate decision makers to make healthcare decisions in accordance with a patient's religious beliefs. A.B. 3514, S.B. 2380, 212th Leg., Reg. Sess. (N.J. 2006).

**\*Texas.** A bill was introduced in the state senate that, among other things, provides for transferable physicians' orders, and prohibits healthcare providers or insurance companies from requiring advance directives as a condition for receiving healthcare services. S.B. 28, 80th Leg. (Tex. 2007).

A bill was introduced in the state house that clarifies that advance directives can be used to request continuation of life-sustaining treatment. H.B. 1094, 80th Leg. (Tex. 2007).

**Vermont.** The state legislature voted down the Patient Control at the End of Life Act. The act would have decriminalized aid in dying. H.B. 44, S.B. 63, 69th Leg., Reg. Sess. (Vt. 2007).

**Wisconsin.** A bill was introduced in the state senate that permits an individual, of sound mind and over 18 years of age, to request, in writing, medication from a physician for the purpose of ending his or her life. S.B. 151, 2007 Reg. Sess. (Wis. 2007).

### Interesting Developments in Other Countries

**Canada.** Ramesh Sharma, MD, of Vernon, British Columbia, has pleaded guilty to counseling or aiding suicide under Sec. 241 of The Criminal Code of Canada. He could be imprisoned for up to 14 years. He will be sentenced on 11 June 2007. Hilary White, "Canadian Doctor Pleads Guilty to Attempted Assisted Suicide Charge," *LifeSiteNews.com*, 4 April 2007, accessed 28 April 2007.

## THE RIGHT TO ACCESS AND CONTROL MEDICAL INFORMATION

### Recent Cases, January 2007 – March 2007

**\*California.** Ongoing litigation. *Taus v. Loftus, et al.* is a case in which a child abuse victim gave permission (at age 17) — and so did her father — for the young woman to be interviewed, and for the taped interview to be shown for "educational purposes." A case study was published that referenced "Jane Doe," but other identifying information was disclosed about the young woman when the researcher gave presentations about the case, including videotaped interviews with the subject in which the subject's first name was

used by the researcher, and the city where the subject lived as a child was disclosed. Based on this information, in conjunction with information disclosed in the researcher's published case study, reporters discovered more about the case and published allegedly defamatory remarks about the subject and the researcher's claims regarding her recovery of repressed memories. 2005 Cal. App. Unpub. LEXIS 3048, 22 media L. Rep. 1545. *Taus v. Loftus, et al.*, 2006 CA S. Ct. S133805. On appeal, the opinion was affirmed in part and reversed in part, and the matter is remanded to the court of appeals for further proceedings. 2007 Cal. LEXIS 2340 (26 February 2007) (Case # S133805).

### Recent Laws and Regulations, January - March 2007

**Federal.** A bill was introduced in the House that, among other things, will encourage the use of electronic health records. Hillary Rodham Clinton has pledged to reintroduce a similar bill in the Senate. H.B. 1952, 110th Cong. (1st Sess. 2007). Colby Itkowitz, "Clinton to Reintroduce Health IT, Respite Care Proposals," *Con-gressional Quarterly*, 17 February 2007, Health-Beat.

**Connecticut.** The state will use a \$5 million grant to develop and implement an electronic health records system for 35,000 Medicaid beneficiaries. Abram Katz, "State switching to electronic med records," *New Haven Register*, 29 January 2007, [http://www.nhregister.com/site/index.cfm?newsid=17777112&BRD=1281&PAG=461&dept\\_id=517515&rfti=8](http://www.nhregister.com/site/index.cfm?newsid=17777112&BRD=1281&PAG=461&dept_id=517515&rfti=8), accessed 29 April 2007.

**\*Iowa.** A bill to implement electronic health records systems incrementally throughout the state died in committee. H.B. 2637, 81st Gen. Assem., 2nd Sess. (Iowa 2005).

**Oklahoma.** A bill was introduced to allow government officials to search offices and medical files of abortion providers without cause, warrant, or announcement. S.B. 617, 51st Gen. Assem., Reg. Sess. (Okla. 2007).

**Vermont.** The Vermont Department of Health has established an electronic registry for advance directives. The Vermont Advance Directive Registry can only be accessed by authorized healthcare providers, funeral directors, and crematory operators. Any information sent over the internet will be encrypted. Vt. Stat. Ann. tit. 18, § 231 (2007).

### MEDICAL TESTING

Concerns about the disclosure of genetic testing and the effect such disclosures has prompted several lawmakers to introduce legislation to prevent genetic discrimination.

Please note there are also testing-related developments reported in the HIV section of this column.

### Recent Laws and Regulations, January - March 2007

**Federal.** Two bills were introduced in Congress that would make it illegal for an employer or health insurer to access genetic information and then make either insurance coverage or decisions regarding the hiring, firing, or promotion of an employee based on such information. The House bill was passed and the Senate version is expected to pass shortly. H.B. 493, S.B. 358, 110th Cong. (1st Sess. 2007).

**Connecticut.** A bill was introduced in the state house that would require newborns be given a deoxyribonucleic acid (DNA) test and that the results be entered upon the birth record and shared with the child's parents. H.B. 5743, 2007 Gen. Assem., Jan Sess. (Conn. 2007).

**\*Ohio.** A bill was introduced in the state house that would limit the liability of hospitals, among other things, for the genetic screening of newborns. The bill died at the end of the last general assembly. H.B. 692, 162nd Gen. Assem., Reg. Sess. (Ohio 2006).

**New York.** Two bills were introduced in the state legislature that would create a genetics advisory council. The council would be charged with advising the governor and legislature on issues relating to genetic tests, access to information, privacy, and counseling. A.B. 03284, S.B. 01633, 2007 Leg., 230th Reg. Sess. (N.Y. 2007).

## DECISION-MAKING CAPACITY/COMPETENCY

### Recent Laws and Regulations, January - March 2007

**\*Federal.** The U.S. DHHS Centers for Medicare and Medicaid Services (CMS) published its final rule on patients' rights with respect to the use of restraints and seclusion on 8 December 2006. These rules became effective 6 February 2007 and apply to all participating Medicare and Medicaid hospitals, including short-term, psychiatric, rehabilitation, long-term, children's, and alcohol/drug treatment facilities. The rule expands the category of practitioners who may conduct patients' evaluations when restraint or seclusion is being used, and includes special notice requirements regarding patients' care, records, and the right to be free of the use of inappropriate restraints or seclusion. The rule also includes stricter reporting requirements for deaths associated with the use of restraints or seclusion. 71 *Fed. Reg.* 71378 (8 December 2006).

## HOSPICE, PALLIATIVE CARE, AND PAIN CONTROL

### Recent Laws and Regulations, January - March 2007

**Federal.** A bill was introduced in the U.S. Senate called the Unborn Child Pain Awareness Act. The act would require medical officials to notify expectant mothers seeking abortion that their unborn child may experience pain while in utero. The bill is currently in committee. S. 356, 110th Congress, Reg. Sess. (2007).

On 21 December 2006 President Bush signed into law the Lifespan Respite Act, which provides \$289 million for training and recruiting workers and volunteers, and educating family caregivers about their services. "Bush signs Ferguson's respite care bill," *Associated Press*, 21 December 2006.

**New York.** A bill was introduced in the state assembly called the Palliative Care Education and Training Act, which provides funds to educate healthcare providers, among other things, about pain management. A.B. 2974, 2007 Leg., 230th Reg. Sess. (N.Y. 2007).

## DEFINITION OF DEATH

### Recent Cases, January 2007 – March 2007

**\*Texas.** *Grotti v. State of Texas*, 2006 Tex. App. Lexis 10018 (17 November 2006). The court overturned a jury verdict that held that a doctor had caused a patient's death by occluding the patient's endotracheal tube (ET) after 60 minutes of coding the patient with little success. At the time of the occlusion, the patient's respiration had slowed to three or four respirations per minute; she had no heart sounds or pulse, but some electrical activity on the monitor. The court found that (1) the evidence contrary to the verdict demonstrates that the patient experienced irreversible cessation of her spontaneous respiratory and circulatory functions prior to 21:50 (the time of the occlusion), and (2) her respiratory efforts between 20:50 and 21:50 were insufficient to maintain life. It is pretty clear, given the facts of this case, that there wouldn't have been a trial if the defendant doctor had simply withdrawn the patient's ET tube, rather than holding her finger over it until the patient stopped moving. (The physician had occluded the ET tube for five minutes.) The case was remanded for a new trial.

## OVERSIGHT: PATIENT TRUST

### Recent Cases, January 2007 – March 2007

**Federal.** The Inspector General of the DHHS, Daniel Levinson, has reopened the cases of 103 National Institutes of Health (NIH) scientists, most of whom only received reprimands and warnings after an ethics probe in 2006 revealed possible conflict of interest. After the earlier probe, only a few scientists were sanc-

tioned. One researcher pled guilty to a misdemeanor conflict of interest charge and was sentenced to forfeit \$300,000 and to do community service. Another was suspended from NIH work for 45 days. Some others received suspensions of just a few days. Criticism from members of the U.S. House Energy and Commerce Committee spurred Levinson to reopen the investigation. The inspector general has also agreed to review current conflict-of-interest policies regarding scientists who do not work at NIH but receive federal grant money.

**Louisiana.** The state supreme court vacated on 9 February 2007 two lower court rulings that the state's \$500,000 cap on damages in medical malpractice lawsuits was unconstitutional. The court held the cap was not at issue and remanded the cases for further consideration on the appropriate questions. *Susan Arrington, et al. v. Galen-Med, Inc., et al.*, Nos. 06-C-2923, 06-C-2944, 06-C-2968 (La. 2007); *Charles and Sharon Taylor, Jr. v. Dr. Richard J. Clement and The Louisiana Patient's Compensation Fund*, Nos. 06-C-2518, 06-C-2581, 06-C-2600 (La. 2007).

### Recent Laws and Regulations, January - March 2007

**Federal.** On 12 February 2007, a resolution was reintroduced that would create a "patients' bill of rights" that would allow patients to sue health-maintenance organizations for improper medical decisions. H.R. 979, 110th Leg., Reg. Sess. (2007).

The DHHS Office for Human Research Protections has released updated guidelines for clinical trials sponsored or supported by DHHS. Now all "unanticipated problems" must be reported. An unanticipated problem is a sub-class of adverse event. Most adverse events are not unanticipated. "An unanticipated incident, experience, or outcome will generally warrant consideration of substantive changes in the research protocol or informed consent process/document or other corrective actions in order to protect the safety, welfare, or rights of subjects." An incident is an unanticipated problem "if it is of an unexpected nature, severity or frequency given the research procedures described in the IRB-approved research protocol or informed consent form and taking into account the characteristics of the subject population; if it is or may be related to participation in the clinical trial; and if it may place trial participants or others at greater risk of physical, psychological, economic or social harm than was previously known." "Guidance on Reviewing and Reporting Unanticipated Problems Involving Risks to Subjects or Others and Adverse Events," 15 January 2007, <http://www.hhs.gov/ohrp/policy/AdvEvtntGuid.htm#Q1>, accessed 27 April 2007.

**Alabama.** A bill was introduced to require the reporting and disclosure of hospital infection rates, "Hospital Infections Disclosure Act." S.B. 409, 2007 Leg., Reg. Sess. (Ala. 2007).

**Arkansas.** The "Health Facility Infection Disclosure Act of 2007," that requires the reporting and disclosure of hospital infection rates, was signed into law on 3 April 2007. H.B. 2735, 86th Gen. Assem., Reg. Sess., (Ark. 2007).

\***California.** A bill was introduced in the California Assembly to establish an Office of Patient Advocate in the State Department of Public Health. The bill passed out of the Health Committee on 7 March 2007 and was re-referred to the Appropriations Committee. It has not yet been scheduled for a hearing. 2007 Text A.B. 52 (4 December 2006); A.B. 52, 2007-2008 Gen. Assem., Reg. Sess. (Calif. 2007).

**Delaware.** A bill was introduced in the state house to require the reporting and disclosure of hospital infection rates. HB 47, 144th Gen. Assem., Reg. Sess. (Del. 2007).

**Massachusetts.** A bill was introduced in the state senate to require the reporting and disclosure of hospital infection rates. S.B. 1269, 185th Gen. Court, Reg. Sess. (Mass 2007).

**Michigan.** A bill was introduced in the state house to require the reporting and disclosure of hospital infection rates. H.B. 4158, 2007 Leg., Reg. Sess. (Mich. 2007).

**Minnesota.** A bill was introduced in the state house that would require the reporting and disclosure of hospital infection rates. H.F. 1076, S.F. 755, 85th Leg., Reg. Sess. (Minn. 2007).

**Oregon.** Two virtually identical bills were introduced in the state legislature that would require the reporting and disclosure of hospital infection rates. H.B. 2524, S.B. 960, 74th Leg. Assem., Reg. Sess. (Or. 2007).

**Texas.** Two virtually identical bills were introduced in the state legislature that would require the reporting and disclosure of hospital infection rates. H.B. 1398, S.B. 288, 80th Leg. (Tex. 2007).

**Washington.** A bill passed the state legislature that would require the reporting and disclosure of hospital infection rates. The bill is currently awaiting the governor's signature. H.B. 1106, 60th Leg., Reg. Sess. (Wash. 2007).

## HIV

### Recent Cases, January 2007 – March 2007

**California.** On 13 April 2007 the California District Court dismissed a suit filed by the AIDS Healthcare Foundation against Pfizer in Los Angeles Superior Court for allegedly promoting the recreational use of its erectile dysfunction drug Viagra. The complaint alleges that the drug is portrayed as a "party drug" that can improve the sex life of healthy men and that such use is not approved by the FDA. *AIDS Healthcare Foundation v. Pfizer*, No. CV07-1154 (C.D. Cal. Filed 22 January 2007).

### Recent Laws and Regulations, January - March 2007

**Federal.** In January a resolution was introduced in the U.S. House to allow the distribution of condoms in prisons. On 2 February the bill was referred to the Subcommittee on Crime, Terrorism, and Homeland Security. H.R. 178, 110th Leg., Reg. Sess. (2007).

By the end of 2007 all states and D.C. will be required to report their HIV cases by name, not anonymously, if they wish to receive funding from the DHHS under the Federal Ryan White Grant Program. 42 U.S.C. § 201.

The FDA is considering changing its policy that prohibits men who have sex with men from ever donating blood. The American Red Cross, the American Association of Blood Banks, and America's Blood Centers believe it would be more reasonable to prohibit such men from donating only if they have had sex with another man within 12 months instead of ever in their lifetime. *FDA Workshop on Behavior-Based Donor Deferrals in the NAT Era*, Wednesday, 8 March 2006, Lister Hill Auditorium, National Institutes of Health, Bethesda, Maryland.

**Arkansas.** On 9 March 2007 the state legislature enacted a bill that would require state prison inmates to receive an HIV test before being released. H.B. 1444, 89th Gen. Assem., Res. Sess. (Ark. 2007).

**California.** A bill was introduced in the California Senate that would allow HIV-positive men to use their own sperm in fertility treatments. There is a process by which the sperm can be washed. S.B. 443, 2007-2008 Leg., Reg. Sess. (Calif. 2007).

**Georgia.** The state legislature passed a bill that would require doctors to offer all pregnant women an HIV test. Women can opt out of the test, but such refusal becomes part of their medical record. H.B. 429, 149th Gen. Assem., Reg. Sess. (GA 2007).

**Illinois.** A bill to allow condom distribution in prisons died in committee. H.B. 686, 95th Gen. Assem., Reg. Sess. (Ill. 2007).

**Maine.** A bill was introduced to amend the state's HIV testing laws to bring them in line with the September 2006 recommendations of the Centers for Disease Control and Prevention (CDC), which suggest that HIV testing become a part of routine medical care. The proposed Maine bill would drop the requirements for written consent and pre-test counseling that now exist under state law. The bill has an opt-out provision. S.P. 180, 123rd Maine Senate, Reg. Sess. (ME 2007).

### Interesting Developments in Other Countries

**Kazakhstan.** In Kazakhstan, 21 doctors are on trial for medical malpractice because they provided HIV-tainted blood transfusions to 100 children at a children's hospital, who subsequently tested positive for HIV.

Ilan Greenberg, "Doctors, and a Medical Procedure, on Trial in Kazakhstan," *New York Times*, 20 March 2007, [http://web.lexis-nexis.com.spot.lib.auburn.edu/universe/document?\\_m=60ed914f881f58e3cd2100b490666e3d&\\_d](http://web.lexis-nexis.com.spot.lib.auburn.edu/universe/document?_m=60ed914f881f58e3cd2100b490666e3d&_d), accessed 25 April 2007.

**Libya.** Five Bulgarian nurses and a Palestinian doctor have filed an appeal with the Libyan Supreme Judiciary Council to overturn a death sentence handed down by a lower court. The healthcare workers were convicted of intentionally infecting 426 children at Al Fateh Children's Hospital in Benghazi Libya with HIV-contaminated blood products and were sentenced to death by firing squad. The Libyan Supreme Judiciary Council is the court of final appeal and is expected to render a decision this summer; [http://www.kaisernet.org/daily\\_report.cfm?DR\\_ID=43062&dr\\_cat=1](http://www.kaisernet.org/daily_report.cfm?DR_ID=43062&dr_cat=1), accessed 20 March 2007.

## **CONSCIENTIOUS OBJECTIONS (HEALTHCARE PROVIDERS AND RELATED PROFESSIONS)**

U.S. conscientious objector laws have their roots in the U.S. Bill of Rights First Amendment Free Exercise Clause and variations thereon that exist in the states. The basic rule is that governments can't force individuals to do things they believe to be against their religion or to be otherwise immoral. Generally, an accommodation for those who raise a conscientious objection must be made unless their exercise of that freedom would directly put someone else at risk. This is why conscientious objection, which is rarely a problem in most contexts, can quickly become problematic in healthcare, where a person's access to care may be affected.

It is important to note that the prohibition is against governments, not private individuals, and perhaps the best first step toward dealing with such issues is through contract and notice. Healthcare providers can contract to have their moral views on certain issues respected by not requiring that they perform certain procedures or discuss certain medical options, but then patients need to be given notice of that particular healthcare provider's position or be provided access to a different non-objecting healthcare provider.

### **Recent Laws and Regulations, January - March 2007**

**Colorado.** On 15 March 2007 the governor signed into law a bill which requires that sexual assault victims receive information about emergency contraceptives. Hospitals are not required to provide the contraceptives, but must provide information regarding such contraceptives. Pharmacies that do not wish to provide emergency contraceptives need not do so, but must post a sign stating that emergency contraceptives are not available through that pharmacy. There are also provisions allowing for individual conscientious objectors to provide information about emergency contraception. S.B. 60, 66th Gen. Assem., Reg. Sess. (Co. 2007).

**Missouri.** Four bills dealing with conscientious objections were introduced in the state legislature. The first two bills would allow pharmacists and related professionals to refuse to provide or dispense contraceptives in most circumstances. But the other two bills would require a pharmacist to fill any valid prescription. H.B. 412, S.B. 285, H.B. 156, S.B. 72, 94th Gen. Assem., Reg. Sess. (Mo. 2007).

A bill was introduced in the state house to allow for conscientious objection to participation in any medical services in most circumstances. The Missouri bill also allows insurance companies to refuse to provide coverage for any service that conflicts with the entity's policies. H.B. 434, 94th Gen. Assem., Reg. Sess. (Mo. 2007).

**New York.** Two bills were introduced in the state senate that would prohibit pharmacists from refusing to provide or dispense contraceptives in most circumstances. S.B. 2317, S.B. 2344, 230th Gen. Assem., Reg. Sess. (N.Y. 2007).

**Oklahoma.** A bill was introduced in the state senate that would require pharmacies and pharmacists to fill all valid prescriptions. S.B. 555, 51st Gen. Assem., Reg. Sess. (Okla. 2007).

**Pennsylvania.** Two bills were introduced in the state legislature that would require a pharmacy or phar-

macists to fill valid prescriptions. H.B. 730, H.B. 316, 191st Gen. Assem., Reg. Sess. (Pa. 2007).

**Rhode Island.** A bill was introduced in the state senate that would allow healthcare providers to refuse to perform abortions or sterilizations on moral grounds. S.B. 452, Gen. Assem., Jan. Sess. (R.I. 2007).

Two bills were introduced in the state legislature that would allow certain individuals to refuse to perform any medical services in most circumstances. S.B. 452, H.B. 5274, Gen. Assem., Jan. Sess. (R.I. 2007).

**South Carolina.** Two bills were introduced in the state legislature that would allow certain individuals to refuse to participate in medical services in most circumstances and to allow pharmacists and related professionals to refuse to dispense contraceptives. H.B. 3283 (general), S.B. 126 (pharmacy related), 117th Gen. Assem., Reg. Sess. 117 (S.C. 2007).

**Texas.** Two bills dealing with conscientious objections were introduced in the state legislature. A house bill would allow pharmacists to refuse to provide or dispense contraceptives in most circumstances, and a senate bill would require pharmacists to fill all valid prescriptions. H.B. 589, S.B. 1591, 80th Leg. (Texas 2007).

**Vermont.** A bill was introduced in the state house that would allow certain individuals and entities to refuse to perform medical services under most circumstances. It also allows insurance companies to refuse to cover any services that conflict with the entities' conscience or religious beliefs. H.B. 315, 69th Gen. Assem., Reg. Sess. (Vt. 2007).

**Virginia.** A bill was introduced in the state house that would require pharmacies to fill valid prescriptions. H.B. 2842, 2007 Gen. Assem., Reg. Sess. (Va. 2007).

**West Virginia.** Five bills dealing with conscientious objections were introduced in the state legislature. The first four bills would allow hospitals, pharmacists, and related professionals to refuse, under most circumstances, to dispense substances that could be used as part of an abortion-related procedure. The last bill would prohibit the same from refusing to provide or dispense contraceptives. H.B. 2903, S.B. 639 (hospitals), H.B. 2092, S.B. 743 (pharmacists), H.B. 2416, 78th Leg., Reg. Sess. (W. VA. 2007).

## HEALTHCARE COVERAGE ISSUES

### Recent Cases, January 2007 – March 2007

**Federal.** The **Eighth Circuit Court of Appeals** ruled on 15 March 2007 that the Union Pacific Railroad Company did not violate the Pregnancy Discrimination Act when it decided that its health plan would not cover the cost of contraception. The court ruled that the plan was not discriminatory because it did not pay for any form of contraception, whether used by men or women. *Brandi Standridge v. Union Pacific*, 479 F.3d; 2007 U.S. App. LEXIS 4914.

### Recent Laws and Regulations, January - March 2007

**Federal.** A resolution was introduced in the U.S. House that would require insurers to cover mental illness at the same level as they cover physical illness. H.R. 1424, 110th Leg., Reg. Sess. (2007).

The DHHS Centers for Medicare and Medicaid Services (CMMS) is considering revising an earlier interim final rule that required documentation of citizenship before the infants of undocumented immigrants could receive Medicaid services.

A bill was introduced in the U.S. House that would provide universal health insurance to all U.S. residents. The AmeriCare Health Care Act would create AmeriCare, a program that would use Medicare to provide health insurance to U.S. citizens who don't receive coverage through their employers and whose annual income falls below 300 percent of the federal poverty level. H.R. 1841, 110th Leg., Reg. Sess. (2007).

**Arizona.** A bill was introduced in the state senate that would require the state to provide no-cost prenatal care to women whose household incomes are below 185 percent of the federal poverty level. This is an

increase in coverage for those women with household incomes between 133 percent and 185 percent of the poverty level. S.B. 1361, 48th Leg., Reg. Sess. (Ariz. 2007).

**Connecticut.** A bill was introduced in the state house to implement universal healthcare coverage in Connecticut. H.B. 6655, 2007 Gen. Assem., Reg. Sess. (Conn. 2007).

**Illinois.** A bill called the "Illinois Healthcare For All Act" was introduced in the state senate to expand the state insurance plan. S.B. 5, 95th Gen. Assem., Reg. Sess. (Ill. 2007).

**Minnesota.** A bill was introduced in the state house that would provide universal health coverage by 2011. H.F. 1856, Leg. 85, Reg. Sess. (Minn. 2007).

**Rhode Island.** Regulations took effect on 1 April 2007 that would require state hospitals to provide care free of charge to any uninsured resident with an income at or below 200 percent of the federal poverty line. Stat. aait. 23, § 1714.

**Virginia.** A bill was introduced in the state senate that would require health insurers to cover the cost of stem cell transplants. S.B. 991, 2007 Gen. Assem., Reg. Sess. (Va. 2007).

**Washington.** Two bills were introduced in the state legislature that would phase in universal health coverage over a five-year period. S.B. 5930, H.B. 2098, 60th Leg., Reg. Sess. (Wash. 2007).

## **OWNERSHIP OF HUMAN GENETIC MATERIAL**

### **Recent Laws and Regulations, January - March 2007**

**Federal.** A resolution was introduced in the U.S. House that would prohibit the patenting of human genetic material. The Genomic Research and Accessibility Act was referred to the Subcommittee on Courts, the Internet, and Intellectual Property. H.R. 977, 110th Leg., Reg. Sess. (2007).